United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

995

UNION PETITIONERS' BRIEF.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,016

JOINT COUNCIL OF TEAMSTERS NO. 42; CONSTRUCTION TEAMSTERS, LOCAL UNION NO. 606; and GENERAL TEAMSTERS, CHAUFFERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 982,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 24,261

ASSOCIATED INDEPENDENT OWNER-OPERATORS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petitions for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

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References to Rulings

The Rulings here under review are those of the National Labor Relations Board reported at 181 N.L.R.B. No. 670 (1970). The decision and order of the Board is found at App. Vol. I, pp. 105-135. Those rulings particularly challenged by the petitioners are at pp. 109-110, 113, 114, 120-121, 125, 125-135.

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UNION PETITIONERS' BRIEF.

STATEMENT OF THE ISSUES.

1. Whether the Board, on the basis of the record before it, correctly ruled that Sections 104.1, 102.2 and 1903, or portions thereof, of the Master Labor Agreement (MLA) violate Section 8(e) of the Act.

2. Whether the Board, on the basis of the record before it, correctly ruled that Article V of the Short Form Agreement (SFA) renders unlawful the secondary provisions of the MLA, which, but for Article V, would be privileged by virtue of the construction industry proviso to Section 8 (e) of the Act.

3. Whether, in view of the Board's conclusion that the owner-operators were employees, its finding of a violation of Section 8(b)(4)(ii)(A) of the Act is supportable as a matter of law.

4. Whether there is substantial evidence in the record to support the Board's conclusion that the owner-operators were employees rather than independent contractors or self-employed persons.

The pending cases have not previously been before this Court.

STATEMENT OF THE CASE.

I.
INTRODUCTION.

These cases are before the Court upon the petition of Joint Council of Teamsters No. 42, Construction Teamsters, Local Union No. 606 and General Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 982 (collectively the Union Petitioners or the Unions), and upon the petition of Associated Independent Owner-Operators, Inc. (Associated), originally filed in the United States Court of Appeals for the Ninth Circuit but transferred to this Court by order dated May 13, 1970, to review an order of the National Labor Relations Board (Board) issued March 5, 1970, pursuant to Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(f) (Act). The Board filed a cross-application for enforcement of its said order.

These cases were consolidated for all purposes by order of this Court, and the Union Petitioners were permitted to intervene in No. 24,261. The Board's decision and order [App. Vol. I, pp. 105-135] are reported at 181 NLRB No. 67 (1970).

Associated filed various charges against the Unions in December 1965, based upon which the General Coun-

sel of the Board issued a consolidated complaint (later amended); hearing was held before a trial examiner on February 7, 1967. The complaint attacked the validity under Section 8(e) of the Act, 29 U.S.C. § 158(e), of certain provisions of the Union's MLA and SFAs. In addition, the complaint alleged inducement of individuals to cease work and threats to employers by the Unions, with an object of reaffirming and giving effect to ("enter into") certain contract provisions which are prohibited by Section 8(e), all in alleged violation of Section 8(b)(4)(i)(ii)(A), 29 U.S.C. § 158 (b)(4)(i)-(ii)(A); these provisions were those contained in the MLA and the SFAs attacked, as aforesaid, in the complaint as violative of Section 8(e). Finally, the complaint alleged that the Unions violated certain of the "secondary boycott" provisions of the Act. The complaint in this latter regard related to alleged inducement of individuals to cease work and threats to employers (contractors) by the Unions, with an object of forcing certain owner-operators to join the Unions and with an object of forcing the cessation of business between these employers and the owner-operators and others, all allegedly in violation of Section 8(b)(4)(i)-(ii)(A) and (B), 29 U.S.C. § 158(b)(4)(i)(ii)(A) and portions of the complaint in this regard were based upon the premise that the owner-operators were "employers" and "self-employed persons" and "persons engaged in commerce" within the meaning of Section 8(b)(4)(i)(ii)(A), and therefore not "employees" within the meaning of Section 2(3) of the Act, 29 U.S.C. §152(3) [App. Vol. I, pp. 33-56].

The trial examiner concluded that the Unions violated Section 8(e) with respect to certain clauses in the MLA and the SFAs, that the Unions also violated Section 8(b)(4)(i)(ii)(A) in the actions they took to allegedly enforce the said clauses, and that the Unions

violated Section 8(b)(4)(i)(ii)(A) and (B) by the use of proscribed means to force the owner-operators to join the Unions and to force employers to cease doing business with the owner-operators and others; in this regard, and after only a cursory examination of the facts and without citing a single case, the trial examiner ruled that the owner-operators were not employees [App. Vol. I, pp. 70-96].

Thereafter the Unions and the General Counsel filed exceptions to the trial examiner's decision [App. Vol. I, pp. 97-104]. The Unions excepted to all adverse findings, except inadvertently for one involving a Section 8(b)(4)(i)(A) violation found regarding employer Klaser. Although this violation assumes the existence of at least one clause in the MLA or SFAs violative of Section 8(e) and that the Unions were attempting to enforce such clauses (circumstances which the Unions contest before this Court), the Unions do not seek to correct the inadvertence in this proceeding.

The Board, partially reversing the trial examiner, and found only three clauses, or portions thereof, of the MLA violative of Section 8(e), namely Sections 104.1, 102.2 and 1903; and it found that certain other subcontracting clauses, otherwise protected by the construction industry proviso to Section 8(e) violative of Section 8(e) because of the existence of Article V of the SFA (a self-help clause), inasmuch as the SFAs incorporate by reference all the clauses of the MLA. The Board also found that the Unions violated Section 8(b)-(4)(i)(ii)(A) of the Act, apparently agreeing with the trial examiner that the actions taken by the Unions were taken with an object of enforcing the said clauses. The Board further found, reversing the trial examiner, that the owner-operators were employees; and in this regard, therefore, the Board reversed the findings of violations of Section 8(b)(4)(i)(ii)(A) and (B) with

regard to forcing employers or self-employed persons (the owner-operators) to join the Union, and with regard to forcing employers to cease doing business with the owner-operators.

II.
FACTS.

A. The Clauses and the Object of the Union's Activity.

The Unions were signatories, with various employers (contractors) in the building and construction industry to collective bargaining agreements known as the MLA [App. Vol. II, pp. 294-315] and the SFAs [App. Vol. II, pp. 316-318]; the SFAs, by Article II thereof, incorporate the MLA by reference. The Board found Section 104.1 of the MLA [App. Vol. II, p. 297] unlawful in its entirety under Section 8(e) on the ground that it was on its face, without extrinsic evidence as to its interpretation and implementation by the parties, a "union signatory clause." Also, it found that Section 102.2 of the MLA [App. Vol. II, pp. 295-296] was a "union signatory clause," on its face, only in so far as it applies to subcontractors. Also, the Board found the second sentence of Section 1903 of the MLA [App. Vol. II, p. 314] to be "secondary" in nature and therefore violative of Section 8(e). Finally, the Board found that Article V of the SFA [App. Vol. II, pp. 316-318] to be a "self-help" clause rendering the lawful subcontracting clauses in the MLA, unlawful. There is no extrinsic evidence in the record as to the interpretation or implementation of the aforesaid clauses by the parties.

It is quite clear from the pleadings in the case before the Board [App. Vol. I, pp. 33-56, 58, 65-68] (the factual allegations of the complaint were largely admitted), and the sparse testimony on the subject [App. Vol. II, pp. 149-150, 155-158, 235-258], that the

Unions' sole purpose in taking the actions which they took was to protest the action of the signatory employers in having hired "employees" (the owner-operators) who had not been required to join the Unions in violation of the recognition, union security and exclusive hiring provisions of the MLA. [App. Vol. II, pp. 298-301; Sections 201-204.9.1.] Not a single one of these latter clauses was attacked in the complaint as violative of Section 8(e), or any other provision of the Act, and there is not a scintilla of evidence that the Unions were attempting to enforce Sections 104.1, 102.2 or 1903 of the MLA or Article V of the SFA's. They could not have meant to do so, since none of these clauses apply to the labor dispute involved in the instant proceeding; these clauses have no applicability, by their terms, to the relationship between the signatory employers and their own employees (*i.e.*, the owner-operators).

B. The Status of the Owner-Operators.

Owner-operators were involved in each of the three construction projects involved herein, namely the Highway 10 project, the Highway 99 project and the Sears project.

(a) The Highway 10 Project.

Klaser Corp. (Klaser), together with others as a joint venture, was the prime contractor on this project; Klaser was a member of the Southern California Chapter of the Associated General Contractors of America (AGC), and as such was bound by the MLA [App. Vol. I, p. 39, par. 2(k), p. 40, par. 6]. Klaser, by oral agreement, contracted with Underwood & Payne Dump Truck Service (Underwood) (broker) for the latter to furnish an unspecified number of trucks and drivers for the wet batch hauling on the Highway 10 project [App. Vol. II, pp. 161-162, 183-184]. Underwood in turn

had entered into written agreements, called subhaul contracts, with various individuals who were sent by Underwood to the Highway 10 project [App. Vol. II, pp. 183, 205, 324-325].

The subhaul contract obligates the subhauler (owner-operator), upon reasonable notice from Underwood, to proceed to the location of loading, and transport property to a designated place; the subhauler receives from Underwood 95 percent of the minimum rate established by the Public Utilities Commission (PUC); the contract may be terminated by either party on 10 days notice for a breach, and it appears also that either party may terminate the contract without notice or cause [App. Vol. II, pp. 324-325].

Glen Underwood of Underwood testified as follows concerning his relation with the subhaulers (owner-operators), (the references in this paragraph are all to Volume II of the Appendix): PUC regulations set the minimum rate which must be paid for the rental of a manned truck, pp. 184, 201; Underwood had 400 or 500 trucks under subhaul contracts with owner-operators, and owner-operators generally sign such agreements with many firms in the construction industry, pp. 188-190; Underwood provides the forms of the subhaul contract for the owner-operator to sign, p. 188; Underwood owned five trucks, two of which it furnished to Klaser manned by individuals who were concededly Underwood employees and covered by a SFA with the Unions, pp. 186-188, 191-193; Underwood would use its employee-manned trucks first and if its arrangement with a contractor required more trucks than it owned, it would implement its subhaul contract with the owner-operators, pp. 189-190; Underwood understands the subhaul contract to mean that, if it called an owner-operator for work, and the latter accepted, then the subhaul contract would govern their relationship, p. 189; Underwood called certain owner-opera-

tors fairly regularly when its employee complement was exhausted, pp. 189-190; Underwood collected the payment for each owner-operator from Klaser (or the joint venture) at the minimum PUC rate, which is based upon a rate per hour of work, deducted its fees and paid the owner-operator with an Underwood check at certain time intervals depending on the individual, pp. 196-197, 201-205; Underwood is required apparently by law, to pay the owner-operator regardless of whether or not Underwood is paid by Klaser, pp. 218-219; with respect to both the owner-operators and the Underwood employees, they were under the direction and control of a Klaser supervisor and not of Underwood, and, other than their method of compensation, the working conditions, including supervision, of these men were the same, pp. 162, 195-196, 198-201; Underwood was paid by Klaser at the same PUC rate for his owned trucks as he was for the owner-operators' trucks which it furnished, pp. 205-206.

(b) The Highway 99 Project.

Guy F. Atkinson Construction Co. (Atkinson) was the prime contractor on this project pursuant to a contract with the California Division of Highways; Atkinson was a member of AGC, and as such was bound by the MLA [App. Vol. I, pp. 35-36, par. 2(a), p. 40, par. 6]. Atkinson, by way of an equipment rental agreement, contracted with J. K. Barker Trucking (Barker) (broker) for the latter to furnish an unspecified number of trucks and drivers to transport dirt on this project [App. Vol. II, pp. 149-153, 319-323]. Barker in turn had entered into agreements, called subhaul contracts, with various individuals who own dump trucks, and it was these individuals who were sent by Barker to the Highway 99 project [App. Vol. II, pp. 222-226, 326-327].

Barker's equipment rental agreement with Atkinson required Barker to furnish dump trucks to Atkinson as needed, and fully operated (manned); Atkinson reserved the right to replace any driver who was found to be "incompetent or undesirable;" provision was made for the payment of overtime by Atkinson, and all work schedules were to be made by Atkinson's Project Manager [App. Vol. II, pp. 319-323]. The PUC rate was to be paid Barker [App. Vol. II, p. 153].

The subhaul contract between Barker and the subhauler (owner-operator) is essentially the same as that between Underwood and its subhaulers (owner-operators). However, the following material differences appear: although the same is implied in the Underwood subhaul contract and so applied in practice, the Barker subhaul contract specifically provides that "it is not to be construed as a contract or agreement for any specific transportation as to time, place, amount of transportation or duration;" while the subhauler must pay all taxes, Barker undertakes to pay the California Transportation Tax and the PUC Tax, with the amount to be deducted by Barker from amounts due to the subhauler; the subhauler receives from Barker 95 percent of the minimum rate established by the PUC, and Barker is obligated to pay these amounts by the 25th day of each month for work performed in the previous calendar month; the Barker subhaul contract may be terminated by either party without notice upon a breach thereof, or on 24 hours notice, but Barker may cancel at any time and apparently without notice and without cause; Barker provides the same form of agreement for all its subhaulers [App. Vol. II, pp. 226, 326-327].

It was stipulated below that Barker's owner-operators functioned on the job in the same manner and had the same relationships as those of Underwood,

described by Glen Underwood, *supra*. [App. Vol. II, pp. 226-227]. The only apparent difference between the Barker and Underwood stituation is that while Barker also owned trucks of his own and manned them with employees covered by a SFA with the Unions, he did not provide any such trucks to the Highway 99 project at any material time herein [App. Vol. II, pp. 223, 234]. There is no evidence, however, that if Barker had supplied owned trucks to the Highway 99 project, the Barker employees would have operated any differently *vis-a-vis* the owner-operators which Barker would have supplied, than the Underwood employees did *vis-a-vis* the owner-operators supplied by Underwood on the Highway 10 project [See App. Vol. II, pp. 250-251].

Certain additional facts are evident in Barker's case, (page references in this paragraph are to Volume II of the Appendix): the only instruction given by Barker to its owner-operators was the location of the job, p. 223 (this is implicit in the Underwood situation also); without consultation with the owner-operators, James K. Barker stopped the work of his owner-operators on the Atkinson job because of the picketing, pp. 225, 227-229, but see p. 247; Barker had no supervision as such on the job, pp. 238, 239-240 (this is implicit in the Underwood situation also); Barker apparently had been following the practice of removing owner-operators which it referred to jobs when the Unions issued so-called "knock-off" slips—these were issued by the Unions when a non-union person (truck owner or not) was on a job, pp. 235-250; the sole job of an owner-

operator on the Atkinson job was hauling, pp. 261, 266-267 (this was also the case in the Underwood situation, pp. 282-283); Barker's owner-operators worked the same hours as all the other construction workers, p. 267 (this was also the case in the Underwood situation, pp. 282-283).

(c) The Sears Project.

Ernest W. Hahn, Inc. (Hahn) was the prime contractor on this project. Hahn subcontracted the concrete work on the project to Cal-West Construction Co. (Cal-West) who in turn subcontracted certain of its excavating work to Lancaster Paving Co. (Lancaster); Chick's Trucking (Chick's) furnished a truck and operator to Lancaster in connection with the latter's excavation work on the project [App. Vol. I, pp. 36-39, par. 2(d)-2(f)].

The work performed by Donald Chick on this project appeared to be no more than having his truck loaded by Lancaster, and driving two or three minutes to the dump and returning [App. Vol. II, pp. 252, 253, 254].

ARGUMENT.

I.

ON THE RECORD BEFORE IT, THE BOARD'S FINDINGS THAT SECTION 104.1 AND PORTIONS OF SECTIONS 102.2 AND 1903 OF THE MASTER LABOR AGREEMENT WERE UNLAWFUL, ARE UNSUPPORTABLE.

A. Sections 104.1 and Portion of 102.2.

Both Section 104.1 and the "subcontractor" portion of Section 102.2 of the MLA are ambiguous. Therefore, in the absence of evidence as to their unlawful administration, they should not be presumed unlawful; the Board should have refused to pass on their validity in accordance with its policy. *Swimming Pool Gunite Contractors Group, et al.*, 158 NLRB 303, 62 LRRM 1047 (1966). These clauses could be lawfully administered to apply to a large project or projects which span a wide geographic area and which call, in the specifications, for the fabrication of materials for use on the job. Article XIII of the MLA [App. Vol. II, p. 309] provides that such work is covered by that agreement. It includes huge jobs such as subways, electric transmission lines, water and flood control projects, dams, canals and rivers and harbors projects. Since such projects are within the scope of the agreement and within the bargaining unit, and fabrication occurs on the site, the clauses aforesaid could not be construed as "union signatory" clauses but would be strictly within the construction industry proviso to Section 8(e). See the Board's treatment below of Sections 104.2, 102.3.2 and 102.3.3 of the MLA, which were found to be lawful [App. Vol. II, pp. 114-115, 118-119.]

B. Portion of Section 1903.

The portion of Section 1903 of the MLA involved (the "membership" clause), is not unlawful. The Unions rely squarely on the Board's decision in *Highway Truck*

Drivers Local 107, 159 NLRB 84, 62 LRRM 1224 (1966), *vacated and remanded*, 383 F.2d 772 (3d Cir. 1967), *cert. denied*, 390 U.S. 905 (1968). This is especially true when it is borne in mind that the erosion of jobs by "employees" posing as "independent contractors" was uppermost in the Unions' effort in this dispute. The same reasoning would be true with respect to owner-operators who were actually performing work as true "independent contractors," as expressed in the first clause of this Section which was found to be lawful by the Board.

II.

ON THE RECORD BEFORE IT, THE BOARD'S FINDING THAT SECTION V OF THE SHORT FORM AGREEMENT RENDERS UNLAWFUL THE SECONDARY PROVISIONS OF THE MASTER LABOR AGREEMENT IS NOT SUPPORTABLE.

The Board correctly ruled that Section 102.3.5.3 through 102.3.5.6 (the so-called self-help clauses of the MLA) were not unlawful, since they relate to the lawful fringe benefit clauses of the MLA. Yet the Board, without benefit of any evidence as to the administration of Article V of the SFAs, found that the latter clause rendered unlawful the subcontracting clauses of the MLA. The Board's finding in this regard is based solely on the fact that Article V is not "tied down to a specific paragraph" of the MLA, and the fact that the SFAs incorporate by reference all pertinent provisions of the MLA.

It is the position of the Unions that the aforesaid incorporation, as it relates to Article V, can be interpreted to be limited in the same manner as the lawful self-help clauses of the MLA; namely, to enforcement by economic action only of the concededly lawful fringe benefit clauses of the MLA. This is especially true since, as with the self-help clauses in the MLA,

Article V appears immediately after the fringe benefit clauses of the SFAs. At the very least, Article V could be so administered, and the Board should have refrained from ruling on the effect of Article V.

In addition, the Unions agree with Board Member Fanning's dissents in *Ets-Hokin Corp.*, 154 NLRB 839, 60 LRRM 1045 (1965), and *Greater Muskegon General Contractors Association,* 152 NLRB 360, 59 LRRM 1081 (1965).

III.

IN VIEW OF THE BOARD'S CONCLUSION THAT THE OWNER-OPERATORS WERE EMPLOYEES, ITS FINDING THAT THE UNIONS VIOLATED SECTION 8(b)(4)(ii)(A) IS UNSUPPORTABLE.

Without discussion, the Board found that the activities of the Unions established that they had as an object the maintenance and reaffirmance of agreements prohibited by Section 8(e). While the Unions admitted in their First Amended Answer to Amended Consolidated Complaint that they had demanded that the various employers with whom they had contractual relations "maintain, reaffirm and give effect" to their contracts [App. Vol. I, pp. 66-68, paras. 15, 20, 25 and 30], the Unions never conceded that they demanded maintenance, reaffirmation or effectuation *of the clauses found by the Board to be unlawful under Section 8(e).*

Indeed, the record is crystal clear, as noted above, that the various agents of the Unions were protesting the use of non-Teamster employees (the owner-operators) by these signatory employers. There is no evidence that the Unions were concerned with any material delivery "employers," or any "independent contractors;" nor was the Union concerned with self-help for the enforcement of sub-contracting clauses. Disputes involving

these clauses would necessarily involve "employers" or "self-employed persons" who are not signatories to the contracts, and, conversely could not involve disputes over "employees" of the signatory employer.

Plainly the Board could not be saying that mere picketing, not related to some unlawful clause in a contract between the parties, but related to other clauses not unlawful under Section 8(e) of the Act (in this case the recognition, union security and hiring hall clauses), *ipso facto* is evidence of an unlawful object under Section 8(b)(4)(i)(ii)(A). Object is a necessary element of proof of a violation of this portion of the Act. *N.L.R.B. v. International Rice Milling Company,* 341 U.S. 665, 672 (1951).

In this case, therefore, if the owner-operators are held to be employees, and regardless of the fact that this Court may affirm the Board's finding that some or all of the clauses involved herein are unlawful under Section 8(e), there is no evidence that the threats and picketing had as their object enforcement of said clauses. Accordingly, there is no substantial evidence that the Unions violated Section 8(b)(4)(i)(ii)(A), except in the case of a violation of Section 8(b)(4)(i)(A) with respect to Klaser and that only because of the inadvertent failure of the Unions to take exceptions to that ruling.

IV.

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S CONCLUSION THAT THE OWNER-OPERATORS WERE EMPLOYEES.

A. Applicable Legal Standards.

The Cupreme Court in *N.L.R.B. v. United Insurance Company of America,* 390 U.S. 254 (1968), held that the test to be applied in distinguishing between employees and independent contractors within the meaning of Section 2(3) of the Act is the common law agency test. The right of control standard is the means

which has evolved in applying the common law agency test, and under the said standard and under general agency principles all incidents of the relationship must be assessed and weighed, and no one factor is decisive.

The Restatement of the Law of Agency 2d, Section 220, pp. 485-486 (1958) states:

§220. Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact among others, are considered.

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

It is well settled that, in determining employment status under the Act, the Board may consider a variety of factors. See, *N.L.R.B. v. Nu-Car Carriers, Inc.*, 189 F. 2d 756, 757 (3rd Cir. 1951), *cert. denied* 342 U.S. 919 (1951); *Deaton Truck Line, Inc. v. N.L.R.B.*, 337 F. 2d 697, 698-699 (5th Cir. 1964) *cert. denied sub nom. Teamsters Local Union 612 v. N.L.R.B.*, 381 U.S. 903 (1965); *Continental Bus System, Inc., v. N.L.R.B.*, 325 F. 2d 267, 271 (10th Cir. 1963). *Cf. United States v. Silk,* 331 U.S. 704, 719 (1947): "It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management," that determines whether individuals are independent contractors. See also *Bartels v. Birmingham,* 332 U.S. 126 (1947); *Rutherford Food Corp. v. McComb,* 331 U.S. 722 (1947).

In excluding independent contractors from the definition of employee in 1947, Congress indicated an intention to overrule the substantive holding in *N.L.R.B. v. Hearst Publications, Inc.,* 322 U.S. 111 (1944), insofar as it rested on the premise that agency principles were not dispositive in determining whether an individual was an employee for purposes of the Act. But by excluding independent contractors, Congress intended "merely to make it clear" that the term employee is "not meant to embrace persons outside that category under the general principles of the law of agency." 93 Cong. Rec. 6441-6442, 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 1537.

See also H. Rep. No. 245, 80th Cong., 1st Sess. 18, 1 Leg. Hist. 1947, p. 309; H. Conf. Rep. No. 150, 80th Cong., 1st Sess. 32-33, 1 Leg. Hist., 1947, pp. 536-537 (conference report).

It is clear, however, that Congress did not intend to alter that portion of *Hearst* dealing with the standard to be applied in reviewing the Board's determination of the kind of broad statutory issue presented here. *United Insurance, supra,* at 260. See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 486, n. 22 (1951).

The determination of whether an individual is an employee or an independent contractor allows considerable latitude for the exercise of judgment and discretion—tasks which the Board, with its wide experience in handling cases involving different employment relationships—is especially competent to perform. The required deference to the Board's conclusion in this regard applies also to those areas involving no special administrative expertise. As stated by the Supreme Court in *United Insurance, supra,* at 260:

> The Board examined all of these facts and found that they showed the debit agents to be employees. This involved the application of law to facts—what do the facts establish under the common law of agency: employee or independent contractor? It should also be pointed out that such a determination of pure agency law involved no special administrative expertise that a court does not possess. On the other hand, the Board's determination was a judgment made after a hearing with witnesses and oral argument had been held and on the basis of written briefs. Such a determination should not be set aside just because a court would, as an original matter, decide the case the other way. As we said in *Universal*

> *Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 'Nor does it [the requirement for canvassing the whole record] mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo' 340 U.S., at 488. Here the least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board's order. It was error to refuse to do so.

The fact that the Board reversed the trial examiner on this issue herein, does not detract from the deference to be accorded its decision in this regard. The facts were not disputed; the Board merely disagreed with the conclusion to be drawn from the facts. In these circumstances, the reversal of the trial examiner is of little consequence in the application of the standard of review. *I.U.E. v. N.L.R.B.*, 273 F. 2d 243, 247 (3rd Cir. 1959). The Board, and not the trial examiner, has the final obligation to find the facts in situations such as this. *N.L.R.B. v. Akin Products Co.*, 209 F. 2d 109, 111 (5th Cir. 1953).

Of special significance, in view of the common law test which must be applied, is *Chapman v. Edwards*, 133 Cal. App. 72, 24 P. 2d 211 (1933). Involved was a wrongful death action, and the sole point urged on appeal was that the defendant excavating contractors were not responsible for the death because the truck driver, an owner-operator whose negligence was the proximate cause of the unfortunate event, was an independent contractor. The court stated:

> An independent contractor is one, who, exercising an independent employment, contracts to do

> a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work. . . . The term 'independent' is descriptive of a contractor. A contractor, obviously, is one party to a contract or one who has contracted to do or perform certain work. 133 Cal. App. at 76.

As in the instant case, there was no distinction between the work of a hired truck or an owned truck. All of the work was to be done on the premises occupied by the excavating contractors in the discharge of their contract. Since the contractors were in exclusive control and management of the shovel from which the owner-operator was loaded, there was no work that he could do independently of the employer. Noting that there was no obligation upon the owner-operator to take any dirt, and no obligation upon the contractors to continue his employment for any period, the Court stated:

> It seems generally conceded that a test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. The power of the employer to terminate the employment at any time is a strong circumstance tending to show the subserviency of the employee, since it is incompatible with the full control of the work usually enjoyed by an independent contractor. Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of an employer to end the service whenever he sees fit to do so. 133 Cal. App. at 77.

The court failed to find one independent act that the owner-operator could perform upon the premises, stating that the record did not disclose where, at any time,

while on the premises, the owner-operator was beyond the immediate control of the excavating contractors. The court then made the following common sense observation particularly applicable to the instant matters:

> Where some fifteen trucks and drivers are engaged in the same labor to a common purpose and working together at all times, it would tend to disorganization rather than toward system to deem that one was an independent contractor merely because he owned the truck he drove. If this particular one were independent, there surely must be some way through which he could manifest his independence. After all, a truck remains but an appliance regardless of its size; a super wheelbarrow, as it were. 133 Cal. App. 2d 78.

The owner-operator in *Chapman* was held to be an employee, and an application to have the cause heard in the California Supreme Court was denied on August 24, 1933. We particularly commend the Court's attention to *Chapman* because it involved an owner-operator on a construction project. Construction projects were the site of employment in the instant matters.

Before leaving *Chapman,* however, we wish to note a further observation by the court which seems particularly relevant to the basis on which the trial examiner found the owner-operators in the instant matters to be independent contractors.

"Klein (the owner-operator), as far as the record indicates was an individual owning a truck. We phrase thusly to negative the idea that Klein was engaged in the trucking business, with men and equipment. As far as indicated Klein owned a truck and obtained employment for himself and this one truck whenever and wherever work was available." 133 Cal. App. at 74-75.

B. The Owner-Operators Are Employees, and the Board Correctly so Found.

(a) The Restatement.

§220(2)(a) Extent of control.

The extent of control over the owner-operators here was almost total, relative to the nature of the function performed. The broker controlled the employment opportunity, since he used his own trucks first before dispatching owner-operators. The broker and the contractor set the wages. The broker received payment first, for the labor of the owner-operators. The broker imposed a "contract of adhesion" on the owner-operators. See *Steven v. Fidelity & Gas Co.*, 58 Cal. 2d 862, 882, 377 P. 2d 284 (1962). The owner-operator could be terminated at any time by either the broker or the contractor. In Barker's case, the broker went onto the job and instructed the owner-operators to leave the job because of the picketing, and Barker apparently reserved the right to remove an owner-operator on the strength of a "knock-off slip" issued by one of the Unions. The owner-operators' sole job was hauling dirt or cement, and while operating in this fashion, they were under the complete control of the contractor. The only work process involved was being loaded by the contractor's loader, and then driving to the dumping place and back, in one case, a drive of three minutes at best. There is no evidence that any owner-operator was ever out of the control of the contractor.

The most convincing evidence in this regard is the fact that the owner-operators worked and were supervised in exactly the same manner as the employee-drivers. Even the method of payment was the same. See *infra*. We cannot improve upon the comment of the court in *Chapman, supra,* "Where some fifteen trucks and drivers are engaged in the same labor to

common purpose and working together at all times, it would tend to disorganization rather than toward system to deem that one was an independent contractor merely because he owned the truck he drove."

§220(2)(b) Distinct occupation or business.

If there is one thing that is unmistakably clear from this record it is that these owner-operators were not engaged in a distinct calling or business of their own, apart from the broker or contractor, but were engaged in the business of the contractor. They were truck drivers, just as the employees of the brokers, and the hundreds of thousands of employee truck drivers employed by American industry. Again, nothing, other than the ownership of their trucks, makes the owner-operators distinct from employees employed in related functions in the construction industry. The owner-operator sells his personal services, as does the employee, and is controlled by the employer, as is the employee; the owner-operator merely, owns a "super wheelbarrow."

Moreover, the owner-operator does not have the economic flexibility of a business man (otherwise stated as minimal control over profits or losses). Thus, the contractor pays for the trucking service at the minimum rate established by the PUC, not on the basis of a bargain reached between the contractor and the broker, or between the contractor and the owner-operator. The owner-operator, in turn, agrees with the broker to work at the PUC rate, whatever it then happens to be, less 5 percent to the broker, the 5 percent, again, being determined by the PUC. The owner-operators do have fixed costs: the depreciation or obsolescence of their truck, their insurance, taxes, etc., plus the maintenance of themselves and their families. A general principle of classical economics is that an entrepreneur should produce so long as he can cover his variable costs (here, gasoline, etc.) even though he is not making his

total costs (variable plus fixed), because anything that he earns toward meeting his fixed costs will reduce the loss which he would otherwise experience on his fixed costs if he were not to produce at all. And, obviously, the higher the fixed costs, the greater the inducement to take any job that will at least cover his variable costs.

The PUC regulations, however, prohibit the owner-operator from responding to that principle. Note by contrast: the contractor can bid as low as he likes; a "professional" sets his own fees; whereas the collective bargaining agreement, or the minimum wage laws establish a "floor" for employees, just as the PUC does for the owner-operators. The fact that the minimum PUC rates are, in practice, also the maximum rates which the contractors will pay for the trucking service is obviously a severe limitation upon the ability of the owner-operators to maximize profits and minimize losses.

For an indication of the congressional view of independent contractors, see H. Rep. No. 245, 80th Cong., 1st Sess. 18, 2 Leg. Hist. 1947, p. 309:

> In the law, there has always been a difference, and a big difference, between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive from the end result, that is, upon profits.

§220(2)(c) How work is done in locality.

It is clear from the evidence in this record that the Unions represent substantial numbers of construction

drivers in the heavily populated Southern California area. [App. Vol. II, p. 295, MLA Section 102.1.] The work which they do is routine in nature and is "done under the direction of the employer [rather than] by a specialist without supervision."

The exact numbers of owner-operators, on the one hand, and employees on the other, is not disclosed in the record. However, it is commonly known that the occupation involved is normally done by employees throughout the country, and in no wise can it be categorized as the calling of a "specialist". Be that as it may, it cannot be denied that the owner-operators perform their work in precisely the same manner as the employees. *Marshall & Haas,* 133 NLRB 1144, 48 LRRM 1790 (1961).

§220(2)(d) Skill required.

Little skill is required, and in any case it is the exact same skill possessed by employees doing the same work.

§220(2)(e) Instrumentalities and place of work.

This is virtually the only factor weighing in favor of the proposition that the owner-operators were independent contractors. We cannot agree with the decision in *Associated Independent Owner-Operators, Inc. v. N.L.R.B.,* 407 F. 2d 1383 (9th Cir. 1969), relied upon by then Board Chairman McCulloch in his dissent below. It is our view that the court in that case gave virtually controlling weight to the factor of ownership of the instrumentalities, in effect, if not in so many words.

Be that as it may, the case is distinguishable from this case for in that case the owner-operator had a modicum of independence in the performance of his assigned tasks; indeed, the court made much of this. That is not the case here. Moreover, there was apparently

no actual evidence that the owner-operators in that case performed work normally performed by employees. Time was not kept on those owner-operators; here time was so kept. [App. Vol. II, pp. 239-240.] Some degree of skill was involved in that case; that is not so here. The Ninth Circuit also relied on the fact that the jobs of the owner-operators were of short duration and that they performed work for a number of contractors and that as a result no continuing employment relationship was created. Whatever the record actually showed in that case, the force of that argument, if any, is extinguished here in that there is some evidence that employee-drivers also worked for a number of contractors due to the fluctuation in construction work. [App. Vol. II, p. 70.] Indeed, employment in the construction industry, in general, is sporadic and is performed by employees for a number of employers. *Daniel Construction Co., Inc.*, 133 NLRB 264, 48 LRRM 1636 (1961).

§220(2)(f) Length of time of employment.

See discussion immediately preceding.

§220(2)(g) Method of payment.

As noted, the method of payment of the owner-operators was by the hour and not by the job. Moreover, the amount of wages was not arrived at by bargaining with the owner-operators, time was kept by the contractor, and the owner-operator did not receive his payment from the contractor but through the broker on a periodic, rather than a per-job basis. The wages of the owner-operator were protected by law in case the contractor did not pay.

§220(2)(h) Regular business of the employer.

It cannot be denied that the work of the owner-operators, as well as that of the employee-drivers, was part and parcel of the contractors' business.

§220(2)(i) Belief of the parties.

This factor is of little weight, except where the belief "indicates an assumption of control by one and submission to control by the other". Restatement §220-(2), Comment on Subsection (2), continued, at p. 492. Despite the recitations of independent contractor status in the equipment rental agreement and the subhaul contracts [App. Vol. II, pp. 319-327], which are of little assistance [*Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947)], there are indications that Barker, at least, followed the practice of removing owner-operators from jobs where there was picketing and based upon Union "knock-off" slips, which are forms for the removal of non-union employees on the job. It seems the owner-operators submitted to this control.

§220(2)(j) Principal in business.

There can be no question that the contractors are in business as principals.

In the light of these factors, the Broad correctly ruled that the owner-operators were employees.

Conclusion.

For the foregoing reasons, the Board's order should be denied enforcement insofar as it involves any violation by the Union of Section 8(b)(4)(i)(ii)(A) (except as to a single instance of Section 8(b)(4)(i)(A) involving Klaser, as noted above), and Section 8(e) of the Act. Associated's petition should be denied.

Respectfully submitted,

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Brief of Petitioner Associated Independent Owner-Operators, Inc. in Support of Its Petition to Review and Set Aside an Order of the National Labor Relations Board.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 24,016

JOINT COUNCIL OF TEAMSTERS, NO. 42; CONSTRUCTION TEAMSTERS, LOCAL UNION NO. 606; and GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 982,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 24,261

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petitions for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

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Brief of Petitioner Associated Independent Owner-Operators, Inc. in Support of Its Petition to Review and Set Aside an Order of the National Labor Relations Board.

STATEMENT OF QUESTIONS PRESENTED.

The issues presented herein are:

1. Whether or not the owner-operators herein are independent contractors rather than employees; and

2. Whether or not the Board's conclusion and holding that Petitioner Unions have not committed viola-

tions of Section 8(b)(4)(i)(ii)(A) and (B) of the Act, as alleged in the Consolidated Complaint herein, is supported by substantial evidence on the record considered as a whole and is contrary to law.

Addendum.

"The pending cases herein have not previously been before this Court.

REFERENCES AND RULINGS.

The Decision and Order of the National Labor Relations Board herein, which is before the Court for Review, was issued on March 5, 1970 in consolidated proceedings known on the records of the Board as Case Nos. 31-CC-52; 31-CE-3; 31-CC-53; and 31-CC-63, and officially reported at 181 NLRB No. 67 (1970) [App. Vol. I, pp. 105-135]."

and officially reported at 181 NLRB No. 67. The proceedings are also before this Court by virtue of the Cross-Petition for Enforcement of said Order filed by the Board as to each of said Petitions.

As the Petitioner herein is aggrieved by said final Order of the Board and Cross-Petitioner herein, this Court has jurisdiction under Section 10(f) of the National Labor Relations Act, as amended [61 Stat. 136, *et seq.* (1947), 29 U.S.C. §141 *et seq.* (1958)] [hereinafter referred to as the "Act"].

II.

Statement of Facts.

A. Introduction.

This case involves the unlawful secondary boycott activity of the Petitioner Unions herein at three construction projects in Southern California. One of the construction projects involved the relocation of Interstate Highway 99 (hereinafter referred to as "Project 99"); one involved the widening of Interstate Highway 10 (hereinafter referred to as "Project 10"); and the third involved the construction for Sears, Roebuck & Company of a department store building in San Bernardino, California (hereinafter referred to as the "Sears Project"). (Vol. I, pp. 33-56; pp. 57-59; pp. 60-62; pp. 65-69; pp. 70-96; pp. 105-135.)

1. Project 99.

The general contractor on Project 99 was the Guy F. Atkinson Construction Company (hereinafter referred to as "Atkinson"). Atkinson entered into an "Equipment Rental Agreement" with Barker Dump Truck Service (hereinafter referred to as "Barker"), which provided for Barker to perform services consisting of transporting decomposed granite on an equipment rental basis, and Atkinson, in turn, to pay Barker a fixed fee per hour for the manned trucks supplied by Barker. Although Atkinson's agreement with Barker contemplated that Barker would supply his own trucks and employees, Barker supplied only owner-operated trucks. The price per hour that Atkinson was obligated to pay Barker for each manned truck was set forth in the Equipment Rental Agreement, and that price was reached between Atkinson and Barker based upon rates established by the California Public Utilities Com-

mission for the operation of such vehicles. Pursuant to said Equipment Rental Agreement Barker referred on a brokerage basis six trucks which were owned and operated by six owner-operators. Neither Atkinson nor Barker owned in whole or in part any of the trucks in question, nor did either own or operate other equipment at such project. The owner operations referred by Barker to Project 99 rendered their services pursuant to a "Subhauling Contract" which each had with Barker. Said Subhauling Contract is a typical subcontract under the terms of which each owner-operator, as an independent contractor, agrees to transport for Barker property and materials in dump truck equipment owned by the owner-operator. [Vol. II, G.C. Exs. Nos. 6 and 8, pp. 319-323; pp. 326-327; Vol. II, p. 149, line 22, to p. 155, line 22; p. 222, line 9, to p. 229, line 18; p. 260, line 14, to p. 264, line 23.]

2. Project 10.

The general contractor on Project 10 was a joint venture consisting of the Kasler Corporation, Gordon H. Ball Enterprises, and E. L. Yeager Construction (hereinafter collectively referred to as "Kasler"). Kasler entered into an oral agreement with Underwood & Payne Dump Truck Service (hereinafter referred to as "Underwood"), the terms of which provide that Underwood would supply Kasler fully manned trucks to haul wet batch cement or cement at said construction project. Pursuant to that oral agreement, Underwood referred to Kasler at various times from six to twenty-four owner-operated trucks. In addition, Underwood supplied to Kasler at various times two trucks owned by Kasler and operated by its employees. Neither Kasler nor Underwood owned in whole or in part any of

the trucks which Underwood supplied which were operated by owner-operators. Like Project 99, the owner-operators referred by Underwood performed their services pursuant to Subhauling Contracts, which, in all material respects, were similar to the Subhauling Contracts to which Barker was a party with the owner-operators it referred to Project 99 aforementioned. [Vol. II; G.C. Ex. No. 7, pp. 324-325; p. 183, lines 1-22; Vol. II, p. 160, line 23, to p. 186, line 21.]

3. The Sears Project.

The general contractor on the Sears Project was Ernest W. Hahn, Inc. (hereinafter referred to as "Hahn"). Hahn, in turn, subcontracted most portion of the construction work to various subcontractors, including Cal-West Construction Co. (hereinafter referred to as "Cal-West"), a cement contractor. In connection with the performance of its concrete work, Cal-West, in turn, subcontracted certain of its excavation work to Lancaster Paving Co. (hereinafter referred to as "Lancaster"). Lancaster, in turn, obtained from Chick's Trucking (hereinafter referred to as "Chick's") a truck and a truck operator for use on said project. Said truck was owned by Chick's, a general partnership, and was driven by Donald Chick, one of the general partners of that firm. Chick's did not operate any other equipment or have any other equipment at the Sears Project. [Vol. II, p. 251, line 21, to p. 255, line 7; p. 255, line 19, to p. 264, line 7.]

B. The Status of the Owner-Operators Herein.

The material facts relating to the status of the owner-operators herein are not in dispute, and may be accurately summarized as follows:

1. Each owner-operator is in the trucking business hauling material on and off construction sites, and, in the course of that business, owns and operates heavy construction equipment consisting of large dump trucks. The original investment for each of said owner-operators for each piece of new equipment owned is approximately $20,000, and some of the owner-operators own more than one piece of equipment. [Vol. II, p. 198, lines 18-20; p. 226, line 17, to p. 227, line 8; p. 261, lines 20-23; p. 279, line 23, to p. 284, line 11; Vol. II, G.C. Exs. Nos. 7 and 8, pp. 324-327.]

2. The owner-operators are not told by anyone what make or model of equipment to buy; they purchase their equipment themselves; and their equipment bears their name and no one else's. [Vol. II, p. 261, line 24, to p. 262, line 4; p. 279, line 23, to p. 284, line 11.]

3. Each owner-operator is a certificated carrier, and is required to obtain, maintain and pay for a certificate of operation from the State of California Public Utilities Commission, and to obtain, maintain and pay for permits to operate issued by the State of California, Board of Equalization, as well as other local governmental bodies. [Vol. II, p. 262, lines 5-9; p. 279, line 23, to p. 284, line 11.]

4. Each owner-operator carries fire, theft, personal injury, personal property and cargo liability insurance; and each owner-operator maintains and pays for such insurance coverage for his equipment. [Vol. II, p. 262, lines 10-14; p. 279, line 23, to p. 284, line 11; p. 161, line 18, to p. 163, line 11; p. 223, line 7, to p. 227, line 5.]

5. Each owner-operator is billed for and pays for the property tax and vehicle tax levied by the State of California and other governmental agencies within the State. [Vol. II, p. 262, lines 15-16; p. 279, line 23, to p. 284, line 11.]

6. Each owner-operator pays for the costs incurred in maintaining his equipment, and each owner-operator pays for the costs incurred in the operation of his equipment. [Vol. II, p. 262, lines 17-21; p. 279, line 23, to p. 284, line 11.]

7. Each owner-operator pays for the cost of garaging his equipment, has complete dominion and control over his equipment, and is free to garage it at any place he chooses. [Vol. II, p. 262, lines 21-22; p. 279, line 23, to p. 284, line 11.]

8. Each owner-operator is responsible for and pays for traffic tickets issued and arising out of the operation of his equipment. [Vol. II, p. 262, lines 23-24; p. 279, line 23, to p. 284, line 11.]

9. In most instances, each owner-operator renders his services pursuant to a Subhauling Contract, and in most instances, each owner-operator is a party to such an agreement with as many as twenty to thirty equipment brokers. Said Subhauling Contract is a typical subcontract under the terms of which each owner-operator, as an independent contractor, agrees to transport property and materials in dump truck equipment owned by him. Typically, each owner-operator performs services under such agreements for many different equipment brokers and for many different contractors. The equipment broker performs the ministerial function of collecting the hourly rental rate from the con-

tractors for whom the owner-operators perform services; and also performs the bookkeeping function of deducting the Public Utilities Commission tax and the Board of Equalization tax on behalf of the owner-operators and forwards same to each of said agencies. In exchange for their services, the equipment brokers are paid a five percent commission by the owner-operators. [Vol. II, p. 201, line 9, to p. 206, line 8; p. 222, line 9, to p. 227, line 9; Vol. II, G.C. Exs. Nos. 7 and 8, pp. 324-325; pp. 326-327; Vol. II, p. 183, lines 1-23; p. 225, line 19, to p. 226, line 14; p. 222, line 9, to p. 227, line 9; p. 260, line 14, to p. 264, line 23; p. 279, line 23, to p. 284, line 11.]

10. Each owner-operator is free to accept or reject a referral from any equipment broker with whom he has a relationship. [Vol. II, p. 263, lines 3-6; p. 279, line 23, to p. 284, line 11.]

11. Each owner-operator is free to and does hire substitutes to drive his equipment, and in each such case, the owner-operator pays the substitute driver himself. [Vol. II, p. 263, lines 6-9; p. 279, line 23, to p. 284, line 11].

12. No deductions for Federal social security taxes, Federal income taxes, State disability taxes or other similar employee deductions are made by either the equipment brokers or the contractors for whom the owner-operators perform services. Each owner-operator pays his own social security taxes and Federal and State income taxes on the same basis that all self-employed persons do. [Vol. II, p. 262, line 25, to p. 263, line 3; p. 279, line 23, to p. 284, line 11.]

13. None of the owner-operators are supervised by equipment brokers, and although they receive directions from the supervisors of contractors on the various construction sties, such directions are limited to what the contractors want accomplished, rather than the details by which the owner-operators are to accomplish the work required. [Vol. II, p. 266, lines 1-24; Vol. II, G.C. Exs. Nos. 7 and 8, pp. 324-327.]

III.
Specification of Error.

1. The Board erred in refusing to adopt the Trial Examiner's Findings of Fact and Conclusions of Law that the owner-operators herein were independent contractors and not employees.

2. The Board's conclusion and holding that the owner-operators herein were employees and not independent contractors is clearly erroneous in that it is not supported by substantial evidence on the record considered as a whole and is contrary to law.

3. The Board's conclusion and holding that Petitioner Unions have not committed violations of Section 8(b)(4)(i)(ii)(A) and (B) of the Act is not supported by substantial evidence on the record considered as a whole and is contrary to law.

IV.
Questions Presented.

The issues presented by the Specification of Error herein are:

1. Whether or not the owner-operators herein are independent contractors rather than employees; and

2. Whether or not the Board's conclusion and holding that Petitioner Unions have not committed viola-

tions of Section 8(b)(4)(i)(ii)(A) and (B) of the Act, as alleged in the Consolidated Complaint herein, is supported by substantial evidence on the record considered as a whole and is contrary to law.

V.

Summary of Argument.

The uncontradicted record evidence herein demonstrates that the owner-operators herein are self-employed persons—independent contractors—not employees. Accordingly, the position taken by the Petitioner in its charges filed herein, by the General Counsel of the Board in his Consolidated Complaint herein, and by the Trial Examiner in his Decision herein that the owner-operators herein were independent contractors and not employees is manifestly correct. The decision of the United States Court of Appeals for the Ninth Circuit in *Associated Independent Owner-Operators, Inc. v. NLRB*, 407 F. 2d 1383 (1969), wherein the Court held that such owner-operators were independent contractors rather than employees, is controlling. Therefore, not only is the Board's conclusion and holding that the owner-operators herein are employees unsupported by substantial evidence on the record considered as a whole, it is also contrary to law.

VI.

Argument.

The Board's Conclusion and Holding That the Owner-Operators Herein Are Employees Is Not Supported by Substantial Evidence on the Record Considered as a Whole and Is Contrary to Law.

In its two-to-one decision, the Board overruled its Trial Examiner, and held that the owner-operators herein were employees rather than independent contractors.[1]

We submit that the Board's conclusion and holding that the owner-operators herein were employees is clearly erroneous in that it is predicated upon legally impermissible inferences drawn by the Board from the uncontradicted record evidence herein. Further, we submit that the Board's decision herein is not only contrary to Board precedent, but flies in the face of the decision of the Ninth Circuit in *Associated Independent Owner-Operators, Inc. v. NLRB,* 407 F. 2d 1383 (9th Cir. 1969).

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[1]The Board's decision herein was made by a three member panel consisting of Board Chairman McCulloch and Board members Fanning and Jenkins. Chairman McCulloch dissented:

> "In light of the decision of the Court of Appeals for the Ninth Circuit in *Associated Independent Owner-Operators, Inc. v. NLRB,* 407 F.2d 1383 (C.A. 9), reversing 168 NLRB No. 112, Chairman McCulloch would affirm the Trial Examiner's finding that the owner-operators are independent contractors. He would therefore find in agreement with the Trial Examiner that the Respondent Unions violated Section 8(b)(4)(i)(ii)(A) and (B) of the Act by engaging in threats, strikes and picketing with the unlawful objects proscribed by the foregoing provisions of the Act."

Vol. I, p. 110, fn. 5.]

An examination of the Board's decision demonstrates that it will not bear scrutiny. Thus, the Board stated:

> "In finding that the owner-operators were independent contractors, the Trial Examiner relied on the fact that they have a substantial financial investment in trucking equipment and sell the services of their trucking equipment and themselves as operators. In addition, he appears to have relied on the fact that the owner-operators paid for and had issued in their names all permits and insurance, paid all maintenance and operating costs on their trucks, and had no taxes or social security withheld from their pay by the contractors or brokers. However, we have repeatedly held that in making determinations whether individuals are independent contractors or employees, the common law 'right of control' test governs. The proper application of this test demands a balancing of all evidence relevant to the relationship. On the entire record in this case, we are of the opinion that at all times relevant herein the owner-operators were employees of the prime contractors on the highway projects and of subcontractor Lancaster on the Sears project.
>
> "Notwithstanding the fact that the owner-operators have substantial financial investments in trucking equipment, pay all maintenance and operating costs, pay for all permits, insurance, social security and income taxes, we are persuaded by the fact that, once on the job, the owner-operators, like the employee-operators, were at all times subject to the supervision of the contractors. In addition, the contractors retained control over the load-

> ers which were essential for loading the trucks, as well as control over the place where the materials were to be unloaded, and the number of trucks and hours of their use. Moreover, the facts that the owner-operators were paid by the hour, did not deal directly with the contractors, and had no control over their hours or rates of pay are indicative of the owner-operators' status as employees who lacked the means to accomplish results through the exercise of independent judgment and skill. Therefore, contrary to the Trial Examiner, we conclude that the owner-operators at the three projects herein were employees rather than independent contractors or self-employed persons. Accordingly, as the Respondent Unions were involved in disputes with the contractors concerning their employees, we find they were not by the above-stated conduct in violation of Section 8(b)(4)(i)(ii)(A) and (B) of the Act, and we shall dismiss the related allegations of the complaint." [Vol. I, pp. 109-110.]

It is readily apparent that what the Board has done in this case, as it has done in similar cases involving this issue, is to *purport* to apply the common law "right of control' test, which requires a balancing of all evidence relevant to the relationship, and then totally *ignore* all the indicia of independent contractor status present.[2]

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[2]As a consequence, the Courts of Appeals have repeatedly denied enforcement of Board Orders denying independent contractor status and remanded same to the Board. See, *e.g., National Van Lines v. NLRB,* 273 F.2d 402 (7th Cir. 1960); *United Insurance Co. v. NLRB,* 304 F.2d 86 (7th Cir. 1962); *NLRB v. Servette, Inc.,* 313 F.2d 67 (9th Cir. 1962); and *Site Oil Co. of Missouri v. NLRB,* 319 F.2d 86 (8th Cir. 1963).

Thus, notwithstanding the multiplicity of indicia of independent ontractor status present herein, the Board is "persuaded by the fact that, once on the job, the owner-operators, like the employee-operators, were at all times subject to the supervision of the contractors." But, that generalization tells us nothing. All independent contractors receive direction from and supervision from the contractor for whom they are performing services. Quite simply, it is the quality and the quantity of that supervision that is material. Here, although the owner-operators received directions from the contractors on the various construction sites for whom they were performing services, such direction was limited to what the contractors expected the owner-operators to accomplish, rather than the details by which the owner-operators were to accomplish the work required.[3] Moreover, the Board fails to note that there were no employees

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[3]Thus, on cross-examination, owner-operator Neal, who performed services on Project 99, testifed:

"Q. Who told you what to do when you got to the job?
A. Well, they told us where the loader was that we were to haul from.
Q. Who told you that?
A. Atkinson's foreman.
* * *
Q. While your truck was parked, they dumped the material in your truck?
A. We would haul it from the loader down over the hill to where the highway was being constructed and dump it.
Q. You were loading this granite, I believe you say?
A. Yes. Decomposed granite.
Q. You had a regular dump truck?
A. Yes, a ten-wheel-ten yards.
Q. You say that the Atkinson foreman told you where to go and what to do?
A. Yes, told me to go get under the loader and told us where to haul the dirt to and dump it."

[Vol. II, p. 266, lines 1-24; p. 279, line 23, to p. 284, line 11.]

of contractors operating dump trucks on any of the three projects herein.

Second, the Board was "persuaded" by the fact that "the contractors retained control over the loaders which were essential for loading the trucks, as well as control over the place where the materials were to be unloaded, and the number of trucks and hours of their use." Here again, such control retained by the contractors herein is nothing more than the limited control that is necessarily incident to every contractor—independent contractor relationship.

Third, the Board was "persuaded" by the fact that "the owner-operators were paid by the hour, did not deal directly with the contractors, and had no control over their hours or rates of pay. . . ." The Board's finding that the owner-operators were paid by the hour is not correct in its implication that they work for wages. Here, what each received can hardly be considered as a wage or salary, because such payments also covered the use of valuable equipment, and from said payments the owner-operators paid their operating and maintenance expenses, as well as the other incidental expenses aforementioned. Moreover, contrary to the Board's conclusion, the owner-operators definitely did have control over their hours of work and rates of pay. The fact is that each owner-operator was free to accept or reject a referral from any equipment broker with whom he had a relationship. Further, pursuant to their Subhauling Contracts with the equipment brokers, each owner-operator was free to negotiate any rate which he felt was appropriate, the only limitation being that he was prohibited by law from working at a rate below the minimum rate established by the Pub-

lic Utilities Commission for the State of California. Quite simply, the compensation of each owner-operator herein depended upon the hours worked and the number and type of equipment owned and operated.[4]

Furthermore, the Board's decision herein flies in the face of the Ninth Circuit's decision in *Associated Independent Owner-Operators, Inc. v. NLRB, supra.* There, as in the instant case, the status of owner-operators members of Petitioner Associated Independent Owner-Operators was at issue. There, as in the instant case, the Board overruled its Trial Examiner, and held that the owner-operators were employees. *Operating Engineers Local 12,* 168 NLRB No. 112, 67 LRRM 1019 (1967).[5] There, as in the instant case, the Board's conclusion and holding that the owner-operators therein were employees was also predicated upon legally impermissible inferences drawn by the Board from uncontradicted record evidence.

We submit that the Ninth Circuit decision in *Associated Independent Owner-Operators, Inc. v. NLRB, supra,* is dispositive of the issue herein.[6]

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[4]The fact that the owner-operators did not deal directly with the contractors is not a factor supporting employee status, but rather, if that fact is accorded any weight, it would appear to support independent contractor status rather than employee status.

[5]Significantly, counsel for the Petitioner Unions herein was also counsel for the respondent unions in *Associated Independent Owner-Operators, Inc. v. NLRB, supra.* The Ninth Circuit's rejection of their contention that the owner-operator members of Petitioner Associated Independent Owner-Operators were employees rather than independent contractors precipitated the filing of the Petitioner Unions' Petition herein in this Court rather than the Ninth Circuit—a blatant example of forum shopping.

[6]Not only did the Board totally ignore the Ninth Circuit decision in *Associated Independent Owner-Operators, Inc. v. NLRB, supra,* but it also ignored its own decision in *International*

The Board's superficial analysis aside, what the Board's decision really stands for is that, in the opinion of the Board, there can be no independent contractor relationship between self-employed individuals who own heavy construction equipment and utilize that equipment to perform services for contractors on construction projects. In the language of the Ninth Circuit—

> "It was this kind of legal legerdemain that Congress sought to prevent when it enacted Section 2(3) [of the Act]." *Associated Independent Owner-Operators, Inc. v. NLRB, supra* at 1387.

For all the foregoing reasons, it is respectfully submitted that the Board's conclusion and holding that the owner-operators herein are employees is not supported by substantial evidence on the record considered as a whole and is contrary to law.

VII.
Conclusion.

The uncontradicted record evidence herein demonstrates that the owner-operators herein are independent businessmen performing services as independent contractors. The Charges of the Petitioner herein, following thorough investigation, were accepted by the General Counsel of the Board as having merit, and in turn, by the Trial Examiner as having been established by the uncontradicted record evidence herein at trial.

Union of Operating Engineers, Local Union No. 12 (Weslie Forsythe), 180 NLRB No. 53, 73 LRRM 1063 (1969). There, the Board again had before it the issue of the status of the owner-operator members of Petitioner Associated Independent Owner-Operators and, following the Ninth Circuit decision in *Associated Independent Owner-Operators, Inc. v. NLRB, supra,* held that the owner-operators therein were independent contractors and not employees.

The Board accepted the factual findings of the Trial Examiner in all respects except one—the Trial Examiner's finding and conclusion that the owner-operators herein are self-employed individuals doing business as independent contractors. In short, the Board's decision herein is based solely upon its disagreement with the Trial Examiner as to the interpretation placed by him upon the uncontradicted facts herein. The Board's decision, however, is predicated upon a total disregard of all the indicia of independent contractor status present herein, and upon legally impermissible inferences drawn from the uncontradicted record evidence herein. Further, the Board totally ignored not only its own precedent, but also the controlling decision in the Ninth Circuit Court of Appeals. It is axiomatic to state that the administrative process, no less than the judicial process, is a reasoned process, Yet, the instant proceeding before this Court cannot be rationalized. It is within the ambit of the authority of this Court and, indeed, this Court's paramount duty, to insure that such abuses of administrative processes do not go uncorrected.

It is respectfully submitted that for the reasons set forth in this Brief, that that portion of the Board's Order and Decision complained of should be set aside; the Board should be ordered to adopt the Decision of the Trial Examiner herein; and to take such further proceedings as are appropriate under the Act.

Dated: September 11, 1970.

PAUL, HASTINGS, JANOFSKY & WALKER,
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By CARL W. ROBERTSON,
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APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sections 151, *et seq.*) are as follows.

* * *

DEFINITIONS

Sec. 2 when used in this Act—

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any person who is not an employer as herein defined.

* * *

UNFAIR LABOR PRACTICES

* * *

Sec. 8 * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8-(e); (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

Nos. 24,016 and 24,261

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT COUNCIL OF TEAMSTERS NO. 42, *ET AL.*,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ASSOCIATED INDEPENDENT OWNER-OPERATORS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

and

JOINT COUNCIL OF TEAMSTERS NO. 42, *ET AL.*,
Intervenors.

On Petitions to Review and Set Aside, and on Cross-Application for Enforcement of, an Order of the National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF ISSUES PRESENTED

1. Whether the Board properly found that the Unions violated Sections 8(e) and 8(b)(4)(i) and (ii)(A) and (B) of the Act.

2. Whether the Board properly found that owner-operators are employees rather than independent contractors.

In accordance with Rule 8(d) of the General Rules of this Court, the Board states that this case is before the Court for the first time on the merits.

REFERENCE TO RULINGS

This consolidated proceeding is before the Court upon petitions to review a Decision and Order (A. 71-79, 105-135)[1] of the National Labor Relations Board issued against Joint Council of Teamsters No. 42, *et al.* (hereafter, Joint Council 42), Construction Teamsters Local Union No. 606 (hereafter, Local 606), and General Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 982 (hereafter, Local 982)[2] on March 5, 1970, and reported at 181 NLRB No. 67. In its answer, the Board has requested enforcement of its order. This Court has jurisdiction of the proceeding under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*).

I. THE BOARD'S FINDINGS OF FACT

A. The 8(e) clauses and the 8(b)(4)(A) violations

1. The Parties and the Master Labor Agreement

On July 1, 1965,[3] the Southern California Chapter of the Associated General Contractors of America (hereafter, the AGC), an employer association

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[1] "A." references are to portions of the record printed in two volumes as the Appendix of the parties. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] Hereafter referred to collectively as the Unions.

[3] All dates are 1965 unless otherwise indicated.

representing employers engaged in the construction industry, entered into a collective bargaining agreement referred to as the Master Labor Agreement (hereafter, the MLA), with Joint Council 42 (A. 79; 294-315). Among the parties to the MLA were Guy F. Atkinson Construction Co. (hereafter, Atkinson), a member of the AGC; Local 982, a member of Joint Council 42; Kasler Corporation (hereafter, Kasler), another AGC member; and Local 606, also a Joint Council member (*ibid.*)

Based on unfair labor practice allegations directed at the contractual relationships of the above parties, the Board found that the following provisions included in the MLA were secondary and proscribed by Section 8(e) of the Act (A. 113-114; 295, 297):

> Section 102.2. All work performed in the Contractor's warehouses, shops or yards, which have been particularly provided or set up to handle work in connection with a job or project covered by the terms of this Agreement, and *all of the production or fabrication of materials by the* Contractor, or *subcontractor, for use on the project shall be subject to the termination conditions of this Agreement.*[4]
>
> * * * * *
>
> Section 104.1. So far as it is within the control of the Contractor or his subcontractors, all materials, supplies and equipment used on the job shall be transported to or from the site of the work by workmen covered by a collective bargaining agreement with the appropriate union. Nothing herein contained shall be construed to prohibit the normal delivery of freight by railroad.

Certain other provisions of the MLA, set forth below, were found by the Board to be secondary but not unlawful because they came within the construction industry proviso to Section 8(e) (A. 117-119, 120-121; 296, 314):

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[4] Only the italicized portion of the clause was found violative of Section 8(e) (A.114).

102.3.1. The Contractor agrees that he, or any of his subcontractors on the jobsite, will not contract or subcontract work to be done at the site of construction, alteration, painting, or repair of a building, structure, or other work, except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body, affiliated with the Building and Construction Trades Department, AFL-CIO, or with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or an affiliate thereof.

102.3.2. A *subcontractor,* for purposes of this Agreement, with the exception of the general provision immediately above, is defined as any person, firm or corporation that agrees under contract with the Contractor, or his subcontractors, to perform any work covered by this Agreement, and who employs workmen as employees to perform services covered by this Agreement, including the performance of labor, or the furnishing and installation of material, or the operation of equipment. All employees of subcontractors will perform work at the appropriate hourly rate and will be reported to such trust funds as are required by the Agreement.

102.3.3. All work performed by the Contractor, or subcontractors, and all services rendered for the Contractor, or subcontractors, shall be rendered in accordance with each and all of the terms and provisions hereof.

102.3.4. If the Contractor, or subcontractors, shall subcontract jobsite work covered under the jurisdiction of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, including the furnishing and installation of materials, performance of labor, or the operation of equipment, provision shall be made in writing for the observance and compliance by the subcontractors with the full terms of this Agreement. * * *

* * * *

1903. When a truck or piece of equipment is driven or operated by its owner as an independent contractor and is

used on jobsite work covered by this Agreement, the owner-driver or operator of said truck, or piece of equipment shall receive a rate of pay not less than that specified in this Agreement. *Such operator shall be, and remain, a member in good standing of the Union and shall have a valid current clearance from the Local Union covered by this Agreement having area jurisdiction.*[5]

2. The Parties and the Construction Short Form Agreements

(a) The Barker Contracts

J. K. Barker Trucking Co. (hereafter, Barker), is engaged in the business of furnishing trucking services to contractors in the construction industry (A. 72; 222). From May 1, 1959 until January 31, 1966, Barker and Local 982 were parties to a Construction Short Form Agreement (hereafter, SFA 1) which contained the following pertinent provisions (A. 84; 234-235, 316).

ARTICLE II

A. The parties hereto agree to be bound by all the terms and conditions of the multiple-employer Labor Agreement, including all supplemental agreements thereto, between the Southern California Chapter of Associated General Contractors of America, and/or others, effective as of May 1, 1957, and all renewals, changes or modifications, thereof entered into between the Association and the Union thereafter, except as such agreement may be specifically modified herein, and except that the provisions of Article IV, Article V and Article VI of the aforesaid Agreement shall not be a part hereof.

* * * *

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[5] Only the italicized portion of Section 1903 was found to be secondary (A. 121).

ARTICLE V

> Nothing contained in this Agreement, expressly or by implication, shall in any way limit or modify the right of the Union to enforce this Agreement by means of legal or economic procedures.

On January 31, 1966, Barker and Local 982 executed a new collective bargaining agreement, the Southern California Teamsters Construction Short Form Agreement (hereafter, SFA II), which includes the following pertinent provisions (A. 85; 234-235, 317):

ARTICLE II

> A. The parties hereto agree to be bound by all the terms and conditions of the multiple-employer Labor Agreement, including all supplemental agreements thereto, between the Southern California Chapter of the Associated General Contractors of America, and others, and the Union, entered into as of August 1, 1965 for application in the counties of Inyo, Mono, Kern, Santa Barbara, San Luis Obispo, Los Angeles, Orange, Riverside, San Bernardino, Ventura, and Imperial, and all renewals, changes, or modification, thereof entered into between the Association and the Union thereafter, except as such agreement may be specifically modified herein, and except that the provisions of Article IV, exclusive of Paragraph 403, thereof, and Article V, exclusive of Paragraph 501, thereof, of the aforesaid agreement shall not be a part of this Agreement.

* * * *

ARTICLE V

> Nothing contained in this Agreement, expressly or by implication, shall in any way limit or modify the right of the Union to enforce this Agreement by means of legal or economic procedures.

(b) The Underwood Contract

Underwood and Payne Dump Truck Service (hereafter, Underwood), also furnishes trucking services to contractors in the construction industry (A. 73;

25). Since February 1, 1964, Underwood, Local 606, and Joint Council 42 have been parties to SFA II, set forth above, and since December 16, 1965, these parties have maintained, reaffirmed and given effect to this collective bargaining agreement (A. 85; 318).

(c) The Board's Findings With Respect to SFA I and SFA II

The Board found that Article V of both SFA I and II is a catchall provision which permits economic, as well as legal, enforcement of the entire agreement (A. 125; 316-318). Since Article II of each SFA incorporates by reference all pertinent provisions of the MLA, the Board found that the self-enforcement provision rendered "unlawful the secondary provisions included in the MLA which, but for Article V, would be privileged by virtue of the construction industry proviso" (*ibid.*).

3. The Unions seek to enforce the Agreements

(a) Highway 99 Project

Pursuant to a contract with the Division of Highways, State of California, Atkinson was engaged, as general contractor, in the relocation of Interstate Highway 99, in Castaic, California (A. 72; 107; 150, 236). On November 10, Atkinson contracted with Barker to provide dump trucks and operators to haul decomposed granite at the jobsite (A. 107, 74; 150, 261, 319-323). Barker had its own equipment and employees and also served in the capacity of a broker for owner-operators, referring them to contractors on a job-to-job basis (A. 74, 108-109; 222-223; and see *infra,* pp. 10-11).

On December 6, Barker began providing trucking services for Atkinson; however, since Barker's employees and equipment were engaged elsewhere, he contacted a number of owner-operators and referred them to the job (A. 74; 264-265).[6] On that day owner-operators Elsworth Neal and Gerald Smith

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[6] As previously stated, both Atkinson and Barker were parties to collective bargaining agreements with Local 982.

reported to the work project and were observed there by William Buchanan, business agent of Local 982 (A. 74; 66). He immediately instructed them that they could work at the jobsite only if they were members of Local 982 or some local Teamster's affiliate (*ibid.*).

As the Unions admitted in their First Amended Answer to the unfair labor practice Amended Consolidated Complaint, the next day Local 982 demanded that Atkinson and Barker maintain, reaffirm and give effect to their respective collective bargaining agreements (A. 74-75; 66). The record also shows that Business Agent Buchanan telephoned Gordon Morrison, Atkinson's area labor relations manager, from Atkinson's office at the Highway 99 project and told him that some of the dump truck drivers referred by Barker were not members of his union and that he should remove those drivers from the site (A. 75; 156). Morrison replied that he would investigate the matter and report back to Buchanan (A. 75; 157). Morrison subsequently called Buchanan and told him that his dispute was with Barker (A. 157). Buchanan insisted it was with the prime contractor Atkinson and threatened "to go get the picket signs" (A. 158).

While at the jobsite the following day, Buchanan saw a loader operator employed by Atkinson loading a truck operated by owner-operator Neal (A. 75; 236). Buchanan informed the loader operator that Neal "is not a union operator. Don't load his truck" (A. 75; 241, 236). James Maxwell, a Barker superintendent, happened to overhear this conversation and asked Maxwell why he stopped the loading operation (A. 75; 240-244). When Buchanan replied that Neal was non-union and the operation would not be completed until he was replaced, Maxwell formally introduced himself and attempted to resolve the dispute (*ibid.*). But Buchanan informed him that, by shutting down the operation, the problem had been resolved. Maxwell requested a "knock-off slip" from Buchanan (A. 75; 243, 236-237). Buchanan refused (A. 75; 237). Whereupon, Maxwell explained that without a "knock-off slip" he was powerless to remove the non-union owner-operators from the jobsite (A. 75; 237-238). Buchanan then radioed Atkinson's project manager, Jim Allworth,

and told him to stop the loading operation because non-union drivers were performing work at the jobsite (A. 75; 237-238, 245-246). Allworth refused, replying that Buchanan's problem was with Barker (*ibid.*). Buchanan then left the area and there was no further disruption of work that day (A. 75; 248). On the ensuing day, December 9, however, Local 982 picketed Atkinson and Barker at the Highway 99 project with signs reading, "Unfair to Teamsters" (A. 75; 66). Thereafter, James Barker went to the jobsite and told the non-union owner-operators to sign out (A. 75; 228-229, 233). Neither Barker nor Atkinson subsequently used these individuals' services in connection with the Highway 99 project.

(b) The Interstate Highway 10 Project

Since September 10, Kasler, together with George H. Ball Enterprises and E. L. Yeager Corporation, was engaged, as general contractor, in the widening of Interstate Highway 10 (A. 107, 73-74; 183-184). Kasler, by oral agreement, contracted with Underwood to provide trucks and drivers to perform services at the jobsite (A. 107, 74; 185). Underwood has its own equipment and employees and also is a broker, referring owner-operators to contractors (A. 107, 162, 185). As previously stated, both Kasler and Underwood were parties to collective bargaining agreements with Local 606 and Joint Council 42.

Sometime in November, Underwood began furnishing trucks and operators to Kasler at the Highway 10 project (A. 76, 107; 162). He sent two of his trucks with his driver-employees, and at various times referred up to 23 or 24 owner-operators including George Silver and Marvin Newton (A. 76, 108; 185, 192). On December 16, after discovering that non-union owner-operators were being employed at the Highway 10 project to provide wet batch cement hauling work, Local 606 and Joint Council 42 demanded that Kasler and Underwood maintain, reaffirm and give effect to their collective bargaining agreements (A. 77; 67-68, 183-184). The record shows that Union agent Bill Stanley told owner-operator Silver that he could work at the site only if he joined Local 606. Stanley also threatened Kasler and employees of Kasler with a

work stoppage at the project. In addition, Stanley, on December 16, threatened Underwood that the Unions would picket the jobsite. Thereafter, Kasler and Underwood ceased using the services of Silver and Newton (*ibid.*).

B. The Status of the Owner-Operators

The Board dismissed that portion of the unfair labor practice complaint alleging that the Unions had violated Section 8(b)(4)(i) and (ii)(A) and (B) of the Act by inducing employees of contractors to engage in a strike or refusal to work, by threatening and coercing certain contractors with strikes and picketing, and by striking and picketing these contractors, all with an object of forcing the contractors to cease doing business with non-union owner-operators of dump trucks used at the jobsites and of forcing or requiring these non-union owner-operators to become Union members. The Board reasoned that the owner-operators were employees of the contractors, rather than independent contractors themselves, and hence could legitimately be required to join the Unions, pursuant to the union security provision of the MLA and SFAs.

All parties appear to agree that the issue as to whether the 8(b)(4) allegations recited above were properly dismissed turns on the status of the owner-operators. Accordingly, we set forth below the facts on which the Board based its determination that the owner-operators were employees, and not independent contractors.

1. The Use of Owner-Operators at three Construction Projects

At the Highway 99 project, as described *supra*, at pp. 7-9, the general contractor, Atkinson, entered into a written "Equipment Rental Agreement" with Barker, a truck rental firm, to supply manned trucks to haul decomposed granite at the jobsite (A. 107, 109; 319-323). The Agreement contemplated that Barker would supply his own equipment and employees; however, in fact, he furnished owner-operated trucks (A. 107-108; 87-88). At any rate, the agreement further provided: that Atkinson's project manager would direct all

work and determine all work schedules; that "all equipment operators shall be subject to the approval of the Contractor and any that are found incompetent or undesirable shall be replaced" (A. 109; 320); and that the "Contractor will keep time on the equipment, and daily records of this time will be available to the [broker] at the Project office" (A. 109; 322).

At the Interstate Highway 10 project, as described *supra,* at pp. 9-10, Kasler, one of the general contractors, orally contracted with Underwood, a truck rental firm, to supply manned dump trucks to haul wet batch cement at the site (A. 107; 48). At various times, Underwood furnished two of his employee-operated vehicles and from 6 to 24 owner-operated trucks (A. 108; 56, 70).

Finally, at the Sears project – not mentioned heretofore and which involved construction of a new store for Sears, Roebuck & Co. in San Bernardino, California – Lancaster Paving Company, a subcontractor on the job, used, in addition to its own loader and dump truck, a second dump truck operated by Donald Chick to haul dirt at the project. Chick was a part owner of Chick's Trucking Company, which supplied the truck pursuant to an oral arrangement with Lancaster (A. 72, 76; 107; 67, 255-256, 36-37).

2. The Specific Arrangements

The manner in which the owner-operators obtained work at the Highway 99 and Interstate Highway 10 projects – through the truck rental firms of Barker and Underwood rather than direct hire by the general contractors Atkinson and Kasler – is a common one in the construction industry in Southern California and indeed had become "somewhat institutionalized" (A. 108). Firms, such as Barker and Underwood, act as "brokers." They not only refer owner-operators to various jobs, but also manage all arrangements concerning the rental of manned trucks, receiving from the contractors sums due for services rendered by the owner-operators (A. 108, n. 4; 162-163, 201-206, 278, 324-327). These terms are established by the brokers' subhaul agreements with

owner-operators and are regulated by the California Public Utilities Commission (A. 108, n. 4; 324-327).

Each broker has his own subhaul agreement with numerous owner-operators (*ibid.*). Each owner-operator, in turn, usually executes subhaul agreements with perhaps 25-30 brokers. The agreement typically obligates the owner-operator or subhauler, upon reasonable notice, to report to a designated loading point and to transport materials upon direction to the delivery point (*ibid.*). The owner-operator is not required to accept a given job; nor does a broker have to offer the job to a particular subhauler (A. 108, n. 4; 195, 182, 207-208). The subhaul agreement also provides for termination under various circumstances (A. 108, n. 4; 324-327).

The owner-operators, by definition, own the trucks they operate, which cost about $20,000 if new, and their names appear on the trucks (A. 109; 261-262). The subhaul agreements, with minor variations not material here, require the owner-operators to pay all maintenance and operating expenses of their trucks as well as fines, license fees, taxes, and workmen's compensation and liability insurance (A. 109; 262-263, 324-327). The necessary permits and insurance are issued in the name of the owner-operator who obtains and pays for them (A. 109; 262-263). Payments for services rendered by the owner-operators are made by the contractor or subcontractor to the broker who, after deducting his 5% fee and certain other items, pays the owner-operator on a fixed date each month (A. 109; 202-206, 278). The rate structure is established by the Public Utilities Commission of the State of California (A. 108, n. 4; 201-206). The broker does not withhold taxes or social security (A. 109; 261-262), but is permitted to deduct from the monthly payments due the subhauler any advances previously made (A. 108, n. 4; 324-327).

Except for the foregoing, the broker exercises no other control over the owner-operator and in no way supervises him in the performance of his duties at the construction jobsite (A. 108-109; 298-301). However, once an owner-operator accepts a referral and reports to the jobsite, he is subject to the

supervision of the contractor, who also has the right to replace or remove the owner-operator (A. 110; 266-268, 248-249). The contractor pays the broker the same flat hourly rate for a truck belonging to the broker and driven by the broker's employee as it does for a truck operated by its owner who has been referred to the job by the broker pursuant to a subhaul agreement (A. 109; 202-206, 278). Ellsworth Neal, an owner-operator whose services and equipment were used on the Highway 99 project, explained how this worked out in practice.[7] As Neal testified, the contractor's foreman would "tell us what they wanted hauled and where they wanted it hauled to" (A. 267). Specifically, Neal was instructed where to drive his truck for loading, and, where to park. The contractor's loader operator would then load the dump truck with decomposed granite, and Neal would be told where to deliver the load (A. 266-268). The job routine was the same whether an owner-operator was doing the work or an individual whose status as an employee was unquestioned (A. 199).

Finally, the contractor controlled the time schedule for work at the site, and the time records for hours worked by the owner-operators were kept by the individual owner-operator and the contractor subject to the contractor's approval (A. 110; 322, 278).[8]

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the findings set forth in the earlier section concerning the MLA and SFA I and II, the Board concluded that Petitioner Unions violated

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[7] The parties stipulated that the testimony of other owner-operators would be substantially similar (A. 279-284).

[8] The Sears' job was different from the Highway 99 and Interstate 10 projects only in that Donald Chick, whose status as an owner-operator is not disputed, was referred to the job through Chick's Truck Company, in which he was a partner and which had an oral arrangement with the excavation subcontractor, Lancaster Paving (A. 108; 255-256). Like the owner-operators on the other projects, Chick's day-to-day duties were the same as acknowledged employees: "he performed the same work under the same supervision as Lancaster's employee operator" (A. 108, 109, 114; 254).

Section 8(e) of the Act by entering into agreements with Atkinson, Barker, Kasler, Underwood, and the Southern California Chapter, AGC, whereby these employers agreed to refrain from doing business with certain other persons in contravention of the prohibitions of Section 8(e). The Board further concluded, based on the conduct described at pp. 7-10, *supra*, that by strike pressure and threats directed variously at Atkinson, Barker, Kasler and Underwood with an object of forcing or requiring these employers to maintain, reaffirm and give effect to provisions of collective bargaining agreements prohibited by Section 8(e) of the Act (*i.e.*, the MLA and SFA provisions found unlawful), Petitioner Unions violated Section 8(b)(4)(i) and (ii)(A) and (B) of the Act (A. 125-126).

The Board's order requires the Unions to cease and desist from the respective unfair labor practices found against them and, relative to the 8(b)(4)(i)(ii)(A) and (B) violations, from engaging in like conduct against any other person employed in commerce or an industry affecting commerce (A. 127-131). Affirmatively, the order requires the Unions to post notices (*ibid.*).

Insofar as Petitioner Unions were additionally charged with violating Section 8(b)(4)(i) and (ii)(A) by forcing or requiring any employer or self-employed person (*i.e.*, the owner-operators) to join a labor organization, and with violating Section 8(b)(4)(i) and (ii)(B) by forcing or requiring other employers to cease doing business with the owner-operators, the Board concluded that the complaint should be dismissed in view of the finding that the owner-operators were employees and not self-employed independent contractors (A. 110).

ARGUMENT

I. THE BOARD PROPERLY FOUND THAT THE UNIONS VIOLATED SECTION 8(e) AND 8(b)(4)(i) AND (ii)(A) AND (B) OF THE ACT

A. Introduction

In 1959, Congress enacted Section 8(e) to supplement existing prohibitions against secondary boycotts by making unlawful "any contract or agreement,

express or implied," whereby the employer agrees not to handle products of another employer or agrees to cease doing business with any other person.[9] In addition, Congress amended Section 8(b)(4)(A) to prohibit a strike or threat to strike designed to achieve such an agreement.

As the Supreme Court explained in *National Woodwork Manufacturing Assoc. v. N.L.R.B.*, 386 U.S. 612, 637-639 (1967), the intention of Congress was not to prohibit all union-employer agreements which may have the incidental effect of a cessation of business with another employer. Rather, Congress envisioned that Section 8(e) would embody the same distinction between lawful "primary" and unlawful "secondary" boycott activity contained in Section 8(b)(4). "The touchstone is whether the Agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *National Woodwork, supra,* 386 U.S. at 645. An agreement so limited is "primary" and permissible, whereas an agreement "tactically calculated to satisfy union objectives elsewhere" is "secondary" and impermissible. A common example of a secondary-objective agreement is a "union signatory clause" – *i.e.*, an agreement permitting the subcontracting of unit work only to employers who are under contract with the union. Such a clause violates Section 8(e) because its principal thrust is to further union interests generally and not to promote the welfare of employees in the bargaining unit. *Id.*, at 644-645; *Houston Contractors Association v. N.L.R.B.*, 386 U.S. 664, 668 (1967); *District No. 9, Machinists v. N.L.R.B.*, 114 App. D.C. 287, 290-291, 315 F.2d 33, 36 (1962); *N.L.R.B. v. Joint Council of Teamsters,* 338 F.2d 23,

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[9] Section 8(e) provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: * * *

28 (C.A. 9, 1964). Thus, in every case in which contract clauses are attacked, careful examination must be made to determine if each clause is a lawful "primary" clause intended for the direct benefit of the employees in the immediate bargaining unit, or a "secondary" clause "tactically calculated to satisfy union objectives elsewhere." *National Woodwork, supra,* 386 U.S. at p. 645.

But the inquiry is not in every case ended simply by a determination that a particular agreement is secondary, for Congress, in enacting a special but limited proviso for the construction industry, exempted from the ban of Section 8(e) those agreements "between a labor organization and an employer in the construction industry relating to the contracting and subcontracting of work to be done at the site of the construction . . . ."[10] This exemption, however, "was intended to be . . . a measure designed to allow agreements pertaining to certain secondary activities *on the construction site* because of the close community of interests there . . ." *National Woodwork, supra,* 386 U.S. at 638-639 (emphasis supplied). As a consequence, secondary-objective agreements executed by parties in the construction industry concerning non-jobsite work are not entitled to privileged status beyond the reach of Section 8(e) (*ibid.*).[11]

Furthermore, the exemption embodied in the construction industry proviso was not intended to immunize agreements which contemplate the use of strikes or other forms of economic pressure by a union to enforce the agreed-upon boycott. Unions in the construction industry can enforce such secondary clauses

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[10] The construction industry proviso states:

> *Provided* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

[11] See also *Drivers, Salesmen, etc. Local Union No. 695 v. N.L.R.B.,* 124 App. D.C. 93, 98, 361 F.2d 547, 552-553 (C.A.D.C., 1966); *N.L.R.B. v. Int'l Bro. of Teamsters, Local 294,* 342 F.2d 18, 21-22 (C.A. 2, 1965).

only through judicial proceedings, and provision for economic enforcement renders secondary provisions unlawful notwithstanding the construction industry proviso. *Orange Belt District Council of Painters No. 48 v. N.L.R.B.*, 117 App. D.C. 233, 236-238, 328 F.2d 534, 537-538 (C.A.D.C., 1964); *N.L.R.B. v. International Brotherhood of Electrical Workers, AFL-CIO, Local No. 769,* 405 F.2d 159, 162-163 (C.A. 9, 1968); *N.L.R.B. v. Muskegon Bricklayers Union No. 5,* 378 F.2d 859, 861-864 (C.A. 6, 1967).

The instant case involves parties engaged in the construction industry. Consequently, the Board, in examining the clauses contained in the various agreements here, considered not only whether the clauses were "primary" or "secondary" in thrust, but also whether they were privileged by virtue of the construction industry proviso. With respect to the Section 8(e) portions of this case, we will first show that the Board properly concluded that two provisions contained in the MLA were unlawful under Section 8(e) because they were secondary in nature and not limited to jobsite work. Next, we will show that five additional sections of the MLA which the Board concluded were secondary – lost the protection of the construction industry proviso when they were incorporated by reference into both SFAs, because each SFA contained a self-enforcement provision (that is, a provision permitting the signatory unions to use "economic procedures" to enforce the secondary MLA clauses).

B. Section 104.1 and the second clause of Section 102.2 of the MLA constitute agreements proscribed by Section 8(e) of the Act

1. Section 104.1

As set forth *supra,* Section 104.1 of the MLA provides, in part, that all materials, supplies, and equipment used on the job shall be transported to or from the site of the work by workmen covered by a collective bargaining agreement with the appropriate union. The secondary thrust of this clause is readily apparent. The Union here could legitimately require that the employer

subcontract the work to a supplier who would abide by "union standards" of wages, hours and the like.[12] But the Union could not go beyond this, as it did here, and require that the employer subcontract only to a supplier who is party to a union contract. As previously stated, such a "union-signatory provision" – Section 104.1 – is unlawful; its aim is secondary, for it is no longer "addressed to the labor relations of the contracting employer vis-a-vis his own employees," but is "tactically calculated to satisfy union objectives elsewhere."

The construction industry proviso affords no protection to Section 104.1. This Section covers "deliveries to or from" construction jobsites. The clearly expressed Congressional purpose in enacting the proviso was to limit the proviso's exception to work actually performed on the construction site and to leave within the ban of Section 8(e) the delivery of materials to the site. "It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from Section 8(e) agreements relating to supplies or other products or materials shipped or otherwise transported to and delivered on the site of construction." I Leg. Hist. (1959) 943.[13] Moreover, the courts[14] and the Board,[15] without exception, have held that the

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12 Contract clauses designed to limit subcontracting of unit work to employers who maintain the same standards of employment, thus minimizing the economic incentive to subcontract have been held lawful. These are the so-called "union standards" clauses. *Retail Clerks Union, Local 1288 v. N.L.R.B. (Mead Market)*, 129 App. D.C. 92, 95, 390 F.2d 858, 861 (1968); *Truck Drivers Union Local 413 v. N.L.R.B. (Patton Warehouse)*, 118 App. D.C. 149, 158, 334 F.2d 539, 548 (C.A.D.C., 1964), cases cited therein, cert. denied, 379 U.S. 916; *Meat and Highway Drivers, Local 710 v. N.L.R.B. (Wilson & Co.)*, 118 App. D.C. 287, 295, 335 F.2d 709, 715-716 (C.A.D.C., 1964).

13 See also II Leg. Hist. (1959) 1433(3).

14 *Drivers, Salesmen, etc. Local Union No. 695 v. N.L.R.B.*, 124 App. D.C. 93, 98, 361 F.2d 547, 552-553 (C.A.D.C., 1966); *N.L.R.B. v. Intern Broth. of Teamsters, Local 294 (Island Dock)*, 342 F.2d 18, 21-22 (C.A. 2, 1965), enforcing, 145 NLRB 484, 491-492 (1963); *Carpenters Local 1273 of United Brotherhood of Carpenters v. Hill*, 398 F.2d 360, 362 (C.A. 9, 1968).

15 *Teamsters, Local Union No. 631 (Reynolds Electric)*, 154 NLRB 67, 69 (1965); *Los Angeles Bldg. Constr. Trades Council (Portofino Marina)*, 150 NLRB 1590, 1592 (1965); (cont'd)

delivery of supplies "to or from" construction projects is not "work to be done at the site of the construction."

In sum, we submit that the meaning of Section 104.1 is clear and that the clause is, on its face, a "union signatory clause" violative of Section 8(e) of the Act and not saved by the construction industry proviso.

2. The second clause of Section 102.2

Section 102.2 provides, in relevant part, that "all of the production or fabrication of material by the . . . subcontractor, for use on the project shall be subject to the terms and conditions of this Agreement." The Board concluded that the above clause was a "union signatory clause" and proscribed by Section 8(e). As the Board found, the clause "permits the subcontracting of work pertaining to the production or fabrication of material but attempts to restrict such work to subcontractors who are covered by the terms and conditions of the MLA, which includes a provision requiring recognition of the union" (A. 114). Petitioner Unions do not attack this finding, but claim that this "union signatory clause" can be construed to cover only construction jobsite production and fabrication work and accordingly should not be deemed outside the protection of the construction industry proviso to Section 8(e) (Un. Br., at p. 12).[16]

Contrary to the Unions' contention, however, Section 102.2 is an unambiguous attempt to impose restrictions on the performance of "off-site" work. The first clause of Section 102.2 specifically covers "work performed in the

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[15] (cont'd) *Cement Masons Local Union No. 97, AFL-CIO (Interstate Employers)*, 149 NLRB 1127, 1130, n. 4, 1131-1132 (1964); *Connecticut Sand & Stone Corp.*, 138 NLRB 532, 535 (1962).

[16] Board Member Fanning dissented from the Board's "off-site" finding, reasoning that the clause is ambiguous, and that absent evidence of unlawful interpretation or implementation, the Board should defer passing on its validity (A. 114, n. 15). In large measure, the Unions adopt Member Fanning's position and argue it here.

Contractor's warehouse, shops or yards," clearly establishing that the Section was intended to apply to "off-site" work.[17] The second clause, under consideration here, in no way limits the intended scope of the Section but merely serves to detail the type of work to be performed – "production or fabrication." It then requires that performance of such work by either the contractor or subcontractor "shall be subject to the terms and conditions of this Agreement," which, of course, means, *inter alia*, that the work can be assigned only to Union members.

An examination of other Sections of the MLA provides additional support for the Board's reading of the second clause of Section 102.2 as covering non-jobsite subcontracting work. For Sections 102.3.1 through 102.3.4 specifically relate to the subcontracting of "work to be performed at the site of the construction," and no plausible reason appears why the clause (102.2) in question was not included with the other jobsite subcontracting provisions (102.3.1-102.3.4) had the parties intended it to apply exclusively to jobsite work. Even more significant, if the Unions' narrow reading of the second clause of Section 102.2 as being limited to jobsite work is correct, then that clause would impose no different requirement than that already imposed by Section 102.3.3, which provides that "[a]ll work performed by the Contractor, or subcontractors, and all services rendered for the Contractor, or subcontractors, shall be rendered in accordance with each and all the terms and provisions hereof" (A. 296). To accept this odd redundancy is to ignore the sound principle that contract clauses *in pari materia*, like statutory provisions dealing with a common subject, are to be construed as giving life to each. To apply the foregoing principle, as we submit is warranted, is to reach the result that the Board

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[17] Thus, as set forth in the Statement (*supra*, p. 3), Section 102.2 provides:

> 102.2. All work performed in the Contractor's Warehouses, shops or yards, which have been particularly provided or set up to handle work in connection with a job or project covered by the terms of this Agreement, and all of the production or fabrication of materials by the Contractor, or subcontractor, for use on the project shall be subject to the terms and conditions of this Agreement.

did: that the second clause of Section 102.2 must be interpreted as covering non-jobsite work.

C. The Board properly concluded that Sections 102.3.1 through 102.3.4 and the second clause of Section 1903 of the MLA were rendered unlawful by the self-enforcement provision of the SFAs.

1. Sections 102.3. to 102.3.4 – the jobsite subcontracting clauses

As set forth *supra*, p. 4, and as we have just pointed out in our discussion of Section 102.2, Sections 102.3.1. through 102.3.4 regulate the subcontracting of jobsite work by signatories to the MLA. In explicit terms, these four sections detail possible types of jobsite subcontracting and impose the requirement that a subcontractor who is performing jobsite work "covered under the jurisdiction of the . . . . Teamsters" must observe and comply "with the full terms of this Agreement" (Section 102.3.4). The Unions in their brief do not contest the Board's finding that Sections 102.3.1 through 102.3.4, either separately or collectively, constitute "union signatory agreements" which are secondary by nature and which would be violative of Section 8(e) were it not for the construction industry proviso permitting such agreements as they relate to jobsite work.

2. Section 1903 of the MLA – the owner-operator provision

The first sentence of Section 1903 provides that "When a truck or piece of equipment is driven or operated by its owner as an independent contractor and is used on jobsite work covered by this agreement, the owner-driver or operator of said truck, or piece of equipment shall receive a rate of pay not less than that specified in this Agreement" (*supra*, pp. 4-5). As the Board found, this "is a primary work protection clause since it requires that contractors observe union standards as to wages when using owner-operators as independent contractors on jobsite work" (A. 121). Clearly, nothing in Section 8(e) or

elsewhere in the Act prevents a union from ensuring that jobsite work claimable by its members will not be lost to them because of contractors or subcontractors using owner-operators willing to accept less than union wages. See cases cited *supra*, at p. 18, n. 12.

The Unions, however. were not satisfied here with the primary work protection provided by the first sentence of Section 1903. For they added a second sentence: "Such operator shall be, and remain, a member in good standing of the Union and shall have a valid current clearance from the Local Union covered by this Agreement having area jurisdiction" (*supra*, p. 5). This, of course, is plainly secondary, as the Board found, since it requires union membership of individuals who are not employees in the bargaining unit.[18] Indeed, it is just like the "union signatory" provisions of Sections 102.3.1 through 102.3.4, which we have shown to be – and which the Unions do not dispute to be – secondary, except that Section 1903 applies to individuals who are not even employees, much less employees of another employer.

The Unions do not actually deny that the second sentence of Section 1903 is secondary, but simply state that it "is not unlawful" (Un. Br., p. 12). To be sure, absent the self-enforcement provisions of Article V of SFA I and SFA II (see *infra*, p. 24), the sentence in question would not be unlawful since, even though it is secondary, it is nonetheless privileged by virtue of the construction industry proviso in Section 8(e). The Unions, however, assert further that they "rely squarely" on the Board's decision in *Highway Truck Drivers and Helpers, Local 107 (S & E McCormick)*, 159 NLRB 84 (1966),[19] presumably to demonstrate that the Board should have held the disputed language of Section 1903 in this case to be primary as it had the clauses at issue in that case. But there the contract required the employers to use only

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[18] See *Retail Clerk Int'l. Assoc., Local Union No. 1288 v. N.L.R.B.*, 129 App.D.C. 92, 95-95, 390 F.2d 858, 861-862 (C.A.D.C., 1968), enforcing, as modified, 163 NLRB 817, 819-820 (1967).

[19] Vacated and remanded on review by the Third Circuit, 383 F.2d 772 (1967), cert. denied, 390 U.S. 905 (1968).

employees to operate leased or hired equipment and, if equipment leased from owner-operators was utilized, to exercise the "right of control" over these owner-operators so as to make them unit employees as a matter of law. Here, in contrast, Section 1903 applies by its terms, not to owner-operators who are employees, but rather to "equipment driven or operated by its owner as an independent contractor." Had the contract in *S & E McCormick* applied to owner-operators working as independent contractors instead of to owner-operators working as " 'employees' . . . required to observe all the standards and conditions prevailing in the unit" (159 NLRB at 100), it is readily apparent the result would have been quite different.

3. Article V of the SFA – the "Self-help" provision

As stated in the Introduction (*supra,* pp. 14-17), under the Act a union in the construction industry is permitted to enter into a secondary clause protected by the proviso to 8(e) only if such a clause is to be enforced through the judicial process exclusively; clauses which sanction strikes or other economic pressure in the event of an employer breach flout the carefully balanced Congressional scheme. In short, Congress intended to continue to permit a general contractor and a union to enter into an agreement whereby the general contractor undertook to engage only union subcontractors; but at the same time, Congress wanted to free the general contractor of all pressures to enforce that agreement, short of a court suit. *Orange Belt, supra,* 117 App.D.C. at 236-238, 328 F.2d at 537-538; *N.L.R.B. v. Int'l. Brotherhood of Electrical Workers, AFL-CIO, Local No. 769, supra,* 405 F.2d at 162-163; *N.L.R.B. v. Muskegon Bricklayers Union No. 5, supra,* 378 F.2d at 861-864. As this Court has stated, ". . . such secondary clauses may be enforced only through lawsuits, and not through economic action." *Orange Belt, supra,* 117 App. D.C. at 236, 328 F.2d at 537.[20]

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[20] The legislative history confirms this interpretation of the operation of the construction industry proviso. See generally House Report No. 1147, 86th Cong. 1st Sess., pp. 39-40, I Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, pp. 943-944; Kennedy, II Leg. Hist. '59, 1431, 1433, Goldwater, II Leg. Hist. '59, 1958.

In the instant case, the Construction Short Form Agreements (SFA I and SFA II) not only incorporate by reference the secondary clauses of the MLA which are proviso protected, but also allow the Unions to utilize self-help to enforce these secondary clauses. Thus, Article II of both SFA I and II incorporates by reference all the relevant provisions of the MLA. And Article V in each SFA expressly authorizes the Unions to enforce these provisions through non-judicial means by providing: "Nothing contained in the Agreement, expressly or by implication, shall in any way limit or modify the right of the Union to enforce this Agreement by means of legal or *economic enforcement*" (emphasis added). Hence, as a consequence of the presence in the SFAs of this "self-help" provision, none of the otherwise exempted provisions of the MLA incorporated by reference now qualify for privileged status. For, as we stated at the outset, the construction industry proviso ceases to operate when a union can use economic as well as judicial sanctions to enforce secondary-objective agreements, as the Unions here are plainly empowered to do by the unambiguous language of Section V.

In sum, we submit that the Board properly concluded that "[s]ince each SFA incorporates by reference all pertinent provisions of the MLA . . . this provision [Article V] renders unlawful the secondary provisions included in the MLA which, but for Article V, would be privileged by virtue of the construction industry proviso" (A. 125).[21]

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21 Contrary to the Unions' suggestion, it is clear that the Board did not miscontrue the intended meaning of Article V of the SFA (Un. Br., at pp. 13-14). Unlike Sections 102.3.5.3 through 102.3.5.6. (self-help provisions included in the MLA which were found by the Board to be limited and inextricably tied to health, welfare and pension fund provisions), Article V is a general catchall self-help provision with no explicit or implicit limitation on its applicability. The only similarity between Article V and Sections 102.3.5.3 through 102.3.5.6. is superficial and meaningless: both numerically follow the provisions dealing with health, welfare and pension funds. However, unlike the Sections in the MLA, Article V of the SFA is not merely one part of a section specifically addressed and limited to the problem of delinquency of welfare payments. Rather, Article V establishes the means of enforcement for the entire SFA.

D. THE BOARD PROPERLY FOUND THE UNIONS VIOLATED SECTION 8(b)(4)(i) AND (ii)(A) AND (B) OF THE ACT

Section 8(b)(4)(i) and (ii)(A) makes it an unfair labor practice for a union:

> (i) to engage in, or to induce any individual employed by any person . . . to engage in a strike or a refusal in the course of his employment to use, . . . process, . . . or to perform any services; or
>
> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> (A) forcing or requiring any employee or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e).

In the instant case, there is no question that the means employed by the Unions at the two highway projects (Highway 99 and Interstate Highway 10) in furtherance of their demands upon contractors fell within the statutory proscription of subsections (i) and (ii) above. The Unions argue, however, that the object of their conduct was not unlawful because "the various agents of the Unions were protesting the use of non-Teamster employees (the owner-operators) by these signatory employers" (Un. Br., at pp. 14-15). The Unions' Answer to the unfair labor practice Complaint in this case does not indicate that their object was so limited. Thus, paragraphs 6 through 10 of the Amended Consolidated Complaint allege that the Unions were parties to the MLA and SFAs and set forth various provisions of those collective bargaining agreements, including the ones which the Board here found to violate Section 8(e) of the Act (A. 8-17). In paragraphs 15, 20, and 25 of their Answer to the Amended Complaint, the Unions admit they demanded that the various contractors maintain, reaffirm and give effect to the collective bargaining

agreements described in paragraphs 6 through 10 of the Complaint (A. 66-67).[22] The Answer does not contain a qualification that the Unions' demands were confined only to those clauses of the collective bargaining agreement relating to owner-operators. Nor do the Unions suggest in what manner they made their demands other than by the conduct proscribed by subsections (i) and (ii) of Section 8(b)(4). Accordingly, the Board was warranted in drawing the inference that *an* object of the Unions' proscribed conduct was to enforce the 8(e) clauses of the MLA and the SFAs in violation of Section 8(b)(4)(i) and (ii)(A).[23]

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[22] Specifically, Paragraph 15 of the Answer states:

> Respondent admits that commencing on or about December 7, 1965, and continuing until on or about December 9, 1965, Local 982 demanded that Atkinson maintain, reaffirm, and give effect to its collective-bargaining agreement with Local 982, which agreement is described in paragraph 6 [of the Amended Consolidated Complaint] above, and that Barker maintain, reaffirm, and give effect to its collective-bargaining agreement with Local 982.

Paragraph 20 of the Answer states:

> Respondent admits that from on or about December 9, 1965, until on or about January 31, 1966, Barker and Local 982 maintained, reaffirmed, and gave effect to the May 1, 1959, collective-bargaining agreement of Barker described in paragraphs 6, 7, 10, 15 and 16 [of the Amended Consolidated Complaint] above and that since on or about January 31, 1966, Barker and Local 982 have maintained, reaffirmed, and given effect to the January 31, 1966, collective bargaining agreement of Barker described in paragraphs 6, 8, 10, 15 and 16 [of the Amended Consolidated Complaint] above.

Paragraph 25 of the Answer states:

> Respondent admits that on or about December 16, 1965, Local 606 and Council, by Bill Stanley, demanded that Kasler maintain, reaffirm, and give effect to its collective-bargaining agreement with Local 606 and Council, which agreement is described in paragraph 6 [of the Amended Consolidated Complaint] above, and that Underwood maintain, reaffirm, and give effect to its collective bargaining agreement with Local 616 and Council which agreement is described in paragraphs 6, 9, and 10 [of the Amended Consolidated Complaint] above.

[23] Once it is established that *an* object of union conduct is secondary, "it makes no difference that there are other objectives present, be they primary or otherwise. *N.L.R.B. v.*

(Cont'd.)

Moreover, even aside from the foregoing, it can scarcely be doubted that the thrust of the Unions' conduct was directed at removing the owner-operators from the jobsite if they were not union members regardless of the legal niceties relating to their status as employees or independent contractors. There is, for example, no persuasive evidence that the Unions made a distinction between those provisions of the MLA and SFAs which required employees to be union members and Section 1903 of the MLA which required owner-operators working as independent contractors to be union members. Since Section 1903, as incorporated in the SFAs, was found to violate Section 8(e), the Unions' efforts to enforce the SFAs against Barker and Underwood further supports the Board's conclusions that the Unions violated Section 8(b)(4)(i) and (ii)(A).[24]

II. THE BOARD PROPERLY DETERMINED THAT THE OWNER-OPERATORS ARE EMPLOYEES WITHIN THE MEANING OF SECTION 2(3) OF THE ACT

Section 2(3) of the Act provides, in relevant part, that the term "employee" shall not include "any individual having the status of independent

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Ftn. 23 (Cont'd.)
Denver Building and Construction Trades, 341 U.S. 675, 687-690 (1951)." *N.L.R.B. v. N.Y. Lithographers, etc. Union,* 385 F.2d 551, 555 (C.A. 3, 1967). It is, of course, well settled that coercive efforts to compel an employer to abide by as well as enter into a contract containing prohibited 8(e) clauses are violative of Section 8(b)(4)(A). *Los Angeles Mailers Union No. 9 v. N.L.R.B.,* 114 App. D.C. 72, 74-75, 311 F.2d 121, 123 (C.A.D.C., 1962), enforcing 135 NLRB 1132 (1962); *District 9, I.A.M. v. N.L.R.B.,* 114 App. D.C. 287, 288-289, 315 F.2d 33, 34 (C.A.D.C., 1962).

[24] In the absence of exceptions, the Board adopted *pro forma* the Trial Examiner's finding of an 8(b)(4)(i)(A) violation based on the Unions' threats to employer Kasler and individuals employed by Kasler at the Interstate 10 project (A. 111, n. 6). Petitioner Unions do not contest enforcement of the Board's order based on this finding (Un. Br., at p. 15).

We submit also, with respect to the 8(b)(4)(i)(ii)(B) violation found by the Board, that the Board could properly infer that pursuit by the Unions of an 8(b)(4)(A) object, as described above, necessarily involved the Unions with pursuit of an 8(b)(4)(B) object as well—disruption of business relationships between Atkinson and Kasler (the general contractors) and Barker and Underwood (the brokers) – as a means, though not the exclusive means, to ensure enforcement of the entire contract, including the provisions prohibited by Section 8(e).

contractor." In enacting this provision, Congress did not define what constituted independent contractor status but intended that in each specific case the issue whether an individual is an employee or an independent contractor is to be determined by the application of general agency principles. *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 256 (1968), and cases there cited.[25]

Under common law agency principles, a critical determination to be made in distinguishing employees from independent contractors is the type and extent of control reserved by those for whom they work. As the court stated in *N.L.R.B. v. Phoenix Life Insurance Co.*, 167 F.2d 983, 986 (C.A. 7, 1948), cert. denied, 335 U.S. 845:

> * * * [T]he test most *usually* employed for determining the distinction between an independent contractor and an employee is found in the nature and amount of control reserved by the person for whom the work is done. * * * [T]he employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, * * *. [I]t is the right and not the exercise of control which is the determining element.

Accord: Restatement of the Law of Agency 2d, Sec. 220(1); *N.L.R.B. v. Lindsay Newspapers, Inc.*, 315 F.2d 709, 713 (C.A. 5, 1963); *N.L.R.B. v. Keystone Floors, Inc.*, 306 F.2d 560, 561-562 (C.A. 3, 1962); *N.L.R.B. v. Steinberg and Co.*, 182 F.2d 850 (C.A. 5, 1950); *N.L.R.B. v. Northwestern Publishing Co.*, 343 F.2d 521, 524 (C.A. 7, 1965).

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[25] In excluding "independent contractors" from the definition of "employee" in 1947, Congress indicated an intention to overrule the substantive holding in *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), insofar as it rested on the premise that agency principles were not dispositive in determining whether an individual was an employee for purposes of the Act. By excluding independent contractors, Congress desired "merely to make it clear" that the term "employee" is "not meant to embrace persons outside that category under the general principles of the law of agency." 93 Cong. Rec. 6441-6442, 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1947), p. 1537.

What the cases – both those in which the courts have agreed and those in which they have disagreed with the Board's conclusion – demonstrate is "that the test for determining the status of workers is much easier to state than it is to apply and that each case must stand or fall on its own peculiar facts. . . ." *Site Oil Co. of Mo. v. N.L.R.B.*, 319 F.2d 86, 91 (C.A. 8, 1963). To be sure, what is involved is "not a purely factual finding of the Board, but . . . . the application of law to facts – what do the facts establish under the common law of agency: employee or independent contractor." *N.L.R.B. v. United Insurance Co., supra,* 390 U.S. at 260. Nevertheless, as the Supreme Court recognized, "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor . . ." And "in such a situation . . . . there is no shorthand formula or magic phrase that can be applied to find the answer, but all the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common law agency principles." *United Insurance, supra* at 258.

There can be no question here but that the Board used the correct standard, for it plainly stated in its decision that "the common law 'right of control' test governs," and that "proper application of this test demands a balancing of all evidence relevant to that relationship" (A. 109). Moreover – and this is the issue raised by Petitioner Associated Independent Owner-Operators (hereafter AIOO) (A. 100) – we submit that a balanced view of all the evidence adequately supports the Board's conclusion "that at all times relevant herein the owner-operators were employees of the prime contractors on the highway projects [Atkinson on the Highway 99 project and Kasler on the Highway 10 project] and of subcontractor Lancaster on the Sears project" (A. 109-110).

It is true, of course, as the Board noted at the outset, that "none of the owner-operators at the two highway projects had any direct dealings with the prime contractors [Atkinson and Kasler]," before they reported to work, for

they "were referred to these jobs by Barker and Underwood under what appears to be a somewhat institutionalized 'broker' arrangement (A. 108). But once they accepted the job and began working, the critical elements of control–right to terminate, scheduling of work, record keeping as to hours worked – were essentially in the hands of the contractors. Nor in any meaningful sense did the owner-operators determine their rate of pay or the manner in which they received their compensation, as would likely be the situation if they were actually independent contractors. Specifically, as the Board pointed out (A. 108-109):

> Once on the job, however, the owner-operators were treated no differently from an employee-operator of the truck rental firms. In neither case did the truck rental firm or broker furnish any supervision on the job.[4] Atkinson's equipment rental agreement with Barker expressly provides that all work and work schedules are to be as and when directed by Atkinson's project manager. The agreement provides also that all equipment operators shall be subject to the approval of the contractor and any found incompetent or undesirable shall be replaced. The record shows that Kasler could remove such an operator without first notifying Underwood. Atkinson's agreement also stipulates that overtime is to be paid by Atkinson and provides that wages and subsistence per diem or "any other fringe benefits (if any) paid" are to be those specified in governing AGC agreements. The record shows further that Atkinson kept a record of the working hours of the owner-operators. Regardless of whether the truck was owner-operated or employee-operated, the contractor paid the truck rental firm or broker the same flat rate per hour and paid for the total manned truck hours in one lump sum.

[4] With respect to owner-operator Donald Chick, he performed the same work under the same supervision as Lancaster's employee-operator.

It is also true, as the Board pointed out, "that the owner-operators have substantial investments in trucking equipment, pay all maintenance and operating costs, pay for all permits, insurance, social security and income taxes. . ."

(A. 110). The Board carefully evaluated these factors, which obviously cut in favor of independent contractor status, but found they were not conclusive. For the "fact of ownership of tools or equipment is helpful in deciding whether one is an independent contractor only because of the inference of right of control arising from ownership. But if the owner, as part of the agreement to perform service, surrenders complete dominion over the instrumentality and the right to decide how it shall be used . . . then the fact of ownership loses its significance." *N.L.R.B. v. Nu-Car Carriers, Inc.*, 189 F.2d 756, 759 (C.A. 3, 1951), cert. denied, 342 U.S. 919.[26] Here, it was entirely reasonable for the Board to find that what was particularly significant and indeed persuasive on the issue is (A. 110)

> . . . . the fact that, once on the job, the owner-operators, like the employee-operators, were at all times subject to the supervision of the contractors. In addition, the contractors retained control over the loaders which were essential for loading the trucks, as well as control over the place where the materials were to be unloaded, and the number of trucks and hours of their use. Moreover, the fact that the owner-operators were paid by the hour, did not deal directly with the contractors, and had no control over their hours or rates of pay are indicative of the owner-operators' status as employees who lacked the means to accomplish results through the exercise of independent judgment and skill.

In opposition to the foregoing, Petitioner AI00 argues that "it is the quality and the quantity of that supervision that is material," and "[h]ere, although the owner-operators received directions from the contractors on the

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26 Owner-drivers – even those who perform their services away from the employer's jobsite, such as over-the-road truck drivers – have on other occasions been found to have employee status under the Act. See, *e.g. Deaton Truck Lines, Inc. v. N.L.R.B.*, 337 F.2d 697 (C.A. 5, 1964), cert. denied, 381 U.S. 903; *N.L.R.B. v. Nu-Car Carriers, Inc., supra.* Nor, as in the instant case, did the employer in *Deaton* withhold taxes or social security from its payments to the owner-drivers. See 143 NLRB 1372, 1384 (1963). Accord: *N.L.R.B. v. Keystone Floors, Inc.*, 306 F.2d 560 (C.A. 3, 1962), enforcing 130 NLRB 4, 9; *N.L.R.B. v. Lindsay Newspapers, Inc.*, 315 F.2d 709 (C.A. 5, 1963), enforcing 130 NLRB 680, 682.

various construction sites for whom they were performing services, such direction was limited to what the contractors expected the owner-operators to accomplish, rather than the details by which the owner-operators were to accomplish the work required" (AI00 Br., p. 14). This argument misses the mark, because the undisputed evidence – the very portion of the record which is cited in the margin of Petitioner's brief (p. 14, n. 3; and see p. 13 of the Counterstatement here) – clearly demonstrates that the owner-operators were not simply given a task to perform, but were instructed in such detail by the contractors' foremen on how to perform it so as to leave them without any discretion whatsoever. Thus, they were told when to report for loading "and where the loader was that we were to haul from"; the loading operation itself was undertaken by the contractors' employees with the contractors' equipment; and the owner-operator was then told where to drive his truck to dump the load. Thereafter, the process was repeated. Indeed, about the only way in which greater supervision could have been exercised over the owner-operators was to have a contractor's foreman ride in the cab of the truck, telling the driver when to shift gears, how fast to go, when to apply the brakes, and when to pull the lever which would tilt the back of the truck upwards.

Furthermore, Petitioner AI00, in support of its view, relies heavily on the Ninth Circuit's decision in *Associated Independent Owner-Operators, Inc. v. N.L.R.B.*, 407 F.2d 1383 (C.A. 9, 1969). That case is factually quite different from the instant case. In that case, the owner-operators did not merely haul dirt from one place to another with a truck, but rather did "grading and excavating work in the construction industry with pieces of equipment known as 'skip-loaders.'" 407 F.2d 1385. A tractor was apparently necessary to pull the skip-loader, and both owner-operators also owned their own tractors. In addition, one of the owner-operators owned his own dump truck; the other rented a truck when necessary. *Ibid.* Moreover, there, unlike here, as the Court pointed out (407 F.2d at 1386):

> Each was engaged in a distinct occupation. . .. . and each was a skilled operator, which is again some evidence of

> independent contractor status. Their specialty, piece-work grading and excavating, was recognized by contractors and home owners in the area. The people who engaged in this occupation worked without supervision at least insofar as they performed jobs for home owners . . . . Even the contractors' supervisors exercised negligible supervision over Vance or Watson after initial instructions regarding the job to be done had been given. Actual exercise of control or lack of it is some evidence of the right which the contractors had to exercise such control.

Furthermore, there, unlike here, "[e]ach man, not the contractors for whom he did work, set the rate of remuneration," and "each submitted his own statement of hours worked to the supervisors who approved the time and forwarded the billing to the contractor's office" (*ibid.*).[27] While the Court in that case mentions other factors which are also present in the instant case, we believe that the differences recited above – involving the type of equipment, complexity of the work, degree of supervision, and the manner in which compensation was set and hourly time was recorded – were crucial to the Court's holding that the owner-operators there were independent contractors and not employees. In short, the Board's conclusion in the case at bar is not at odds with the result the Ninth Circuit reached in *Associated Independent Owner-Operator, Inc. v. N.L.R.B., supra.* Hence, affirmance of the Board's decision herein, far from creating any conflict, would be but another example of the principle that in this area "each case must stand or fall on its own peculiar facts . . . ." *Site Oil Co. v. N.L.R.B., supra.*[28]

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[27] Indeed, in that case, one of the owner-operators actually established his own time schedule and shifted on a regular basis between three separate jobs for different contractors.

[28] Petitioner AI00 again ignores this principle in asserting that the Board here "ignored its own decision in *International Union of Operating Engineers, Local Union No. 12 (Weslie Forsythe),* 180 NLRB No. 53, 73 LRRM 1063 (1969). In that case, the Board found an owner-operator of a backhoe to be an independent contractor because, *inter alia,* he "is retained by contractors to perform specific jobs . . .;" he "sets his own price for each job, and from time to time over the years has raised his rates . . .;" he "keeps and records his own time and turns it in to the foreman or to the superintendent if one of them is still on (cont'd)

In sum, the determination as to whether the owner-operators in this case are employees or independent contractors concededly presents a difficult question. Reasonable men can differ on the issue, and indeed have, since the Board, in holding that the owner-operators are employees, reversed the Trial Examiner with Chairman McCulloch dissenting (A. 110, n. 5). Nevertheless, "the Board's determination was a judgment made after a hearing with witnesses . . . . and on the basis of written briefs. Such a determination should not be set aside just because a court would, as an original matter, decide the case the other way." *N.L.R.B. v. United Insurance Co., supra,* 390 U.S. at 260. As we submit we have shown, "[h]ere the least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should . . . . [affirm the Board]." (*ibid.*).[29]

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28 (cont'd) the job . . . ;" if he "has not completed a trench when other project work stops and supervision goes home, he continues to work . . . ;" the only instruction he receives is the width, depth and location of the trench; he "uses his independent judgment, based on his knowledge of construction and of the bearing qualities of soil to dig the trench deeper when he runs into a fill spot or bad soil . . . . ;" and he is "free to leave the job anytime it suits his convenience and is responsible only for the finished result" (slip opinion of Trial Examiner, p. 3). Compare *Construction Building Material and Miscellaneous Drivers Local Union No. 83, IBT (Marshall & Hass),* 133 NLRB 1144 (1961). See *Shamrock Dairy,* 124 NLRB 494, aff'd sub nom, *Teamsters Local 310 v. N.L.R.B.,* 108 App. D.C. 117, 280 F.2d 665 (C.A.D.C., 1960), cert. denied, 364 U.S. 892; *Pure Seal Dairy Co.,* 135 NLRB 76, 79 (1962).

29 The only issue before the Court is whether the Board properly dismissed the complaint on the ground that the owner-operators were employees rather than independent contractors. Accordingly, should Petitioner AI00's contention that the owner-operators were independent contractors rather than employees be sustained, we respectfully submit that the case should be remanded for further proceedings consistent with the Court's disposition of this issue, and not, as Petitioner AI00 asserts (Br. 18) with instruction to enter an order 'adopt[ing], the decision of the Trial Examiner herein . . . " *Retail Store Employees Union, Local 400, etc. v. N.L.R.B.,* 123 App. D.C. 360, 361-362, 360 F.2d 494, 495-496 (C.A.D.C., 1965); *Local 152, Teamsters v. N.L.R.B.,* 120 App. D.C. 25, 27-28, 343 F.2d 307, 309-310 (C.A. D.C., 1965).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions to review should be denied and that a judgment should issue enforcing the Board's order in full.

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